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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

JOHN M. RYDER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Predicate To Question 1

Plaintiff's job was eliminated in April 1993, and he brought this action alleging age discrimination. At trial, plaintiff sought to introduce a memorandum containing a paraphrased summary of a meeting held more than a year after plaintiff's job was eliminated. That meeting was attended by unidentified managers from various divisions and functions located in different areas of the country and by the new CEO of Westinghouse, who was hired months after plaintiff's job was eliminated. The memorandum was drafted about two months after the meeting and contained statements plaintiff argued could be interpreted as displaying an age discriminatory corporate culture. However, the memorandum makes no direct or indirect reference to plaintiff, plaintiff's job or location, the person who decided to eliminate plaintiff's job, the decision to lay off plaintiff or of any other nexus to the plaintiff. Defendant objected to the admission of the memorandum on F.R.E. 401 and 403 grounds, but the trial court admitted it.

The record shows no evidence that the district court performed the required balancing under F.R.E. 403 between any relevance the memorandum might have and the prejudicial impact it would have upon Westinghouse. Plaintiff then used it in cross examination and argued at length to the jury that the memorandum displayed the ageist "tone" and "atmosphere" in which the decision to eliminate the job was made and that the asserted discriminatory comments "infiltrate[d]" the thought process of the decision maker. The court of appeals affirmed the admissibility of the memorandum.

QUESTION 1

Did the court of appeals err as a matter of law in holding that a memorandum containing prejudicial remarks purporting to show discriminatory managerial attitudes was admissible without requiring any nexus linking the remarks to the plaintiff or the elimination of his position?

Predicate to Question 2

Jury instructions in an age discrimination case require specific explanation as to where the burden lies, when it shifts, and the distinctions between a pretextual reason for the alleged discrimination and proof of actual discrimination.

In stating the law to the jury, the lower court erroneously instructed that disbelief of the employer's stated reasons for the challenged employment decision (pretext) is by definition unlawful discrimination. The trial court never corrected that instruction to reflect accurately the law that the jury could disbelieve the reasons given by the employer without finding age discrimination and in favor of the plaintiff. Later in the instructions, the trial court did instruct the jury correctly that the burden was on the plaintiff to prove age discrimination.

Having given the conflicting instructions, the trial judge gave no curative instruction and left it to the jury to determine which instruction of law was correct. The court of appeals held the instruction on the law of pretext to be erroneous and did not consider it to be harmless error, but concluded that the jury charge "as a whole" was correct and therefore was not erroneous.

QUESTION 2

Where the trial judge erroneously instructs a jury on a key element of the law and then later instructs the jury correctly, but does not issue a curative instruction or identify which statement of the law was correct, is remand required as the majority of circuits hold?

LIST OF PARTIES

Plaintiff John M. Ryder was an adult citizen of the Commonwealth of Pennsylvania. At the time of trial, defendant Westinghouse Electric Corporation was a company with its principal place of business in Pittsburgh, Pennsylvania. It has since changed its name to CBS Corporation, a Pennsylvania corporation, with its principal place of business in New York, New York.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. The circuits' conflicting decisions on admissibility of "stray remarks" purporting to show discriminatory attitudes or corporate culture, which lack any nexus to the employment action but have unfair prejudicial impact, requires resolution 9

II. All circuit courts should be mandated to remand — as a majority of circuits do — where conflicting jury instructions on the same key legal point make it impossible to determine if the jury based its verdict on the correct or erroneous instruction 16

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: Page

Blossom v. CSX Transport, Inc., 13 F.3d 1477 (11th Cir. 1994) 18

Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326 (3d Cir. 1995) 11

Conway v. Electro Switch Corp., 825 F.2d 593 (1st Cir. 1987) 10

Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325 (6th Cir. 1994) 11

Daubert v. Merrel Dow Pharms., Inc., 509 U.S. 579 (1993) 13

Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1992) 12

Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991)..... 9, 11

Francis v. Franklin, 471 U.S. 307 (1985) 17, 18, 20

General Elec. Co., et al. v. Joiner, ____ U.S. ____, 1997 U.S. LEXIS 7503 (December 15, 1997) 13

Houston v. Herring, 562 F.2d 347 (5th Cir. 1977) 18

Jamesbury Corp. v. Litton Indus. Prod., 756 F.2d 1556 (Fed. Cir. 1985) 18

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 12

McLaurin v. Fischer, 768 F.2d 98 (6th Cir. 1985) 10, 11

Mercer v. Theriot, 377 U.S. 152 (1964) 20

Moreau v. Pennsylvania R.R. Co., 166 F.2d 543 (3rd Cir. 1948) 17

O'Connor v. Consol. Coin Caterers Corp., 56 F.3d 542 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 878 (1996)..... 10

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

O-So Detroit, Inc. v. Home Ins. Co., 973 F.2d 498 (6th Cir. 1992) 17

Parker v. Randolph, 442 U.S. 62 (1979) 16

Ryder v. Westinghouse Elec. Corp., 128 F.3d 128 (3d Cir. 1997) 6, 7, 17

Seitzer v. Chesley, 512 F.2d 1030 (9th Cir. 1975) 19

Sessoms v. Union Sav. & Trust Co., 338 F.2d 752 (6th Cir. 1964) 17

Smalley v. Duluth, W. & Pac. Ry., 940 F.2d 296 (8th Cir. 1991) 18

Spartanburg County Sch. Dist. v. Nat'l Gypsum Co., 805 F.2d 1148 (4th Cir. 1986) 18

Thornley v. Penton Publ'g, Inc., 104 F.3d 26 (2d Cir. 1997) 18

Touchet v. Halliburton Co., 1996 U.S. App. LEXIS 3353 (10th Cir. 1996) 10

Wilde v. Florida Pneumatic Mfg. Corp., 941 F. Supp. 1203 (S.D. Fla. 1996) 12

TABLE OF AUTHORITIES—*(Continued)*

Statutes: Page

28 U.S.C. § 1257 2

28 U.S.C. § 2101(c) 2

29 U.S.C. § 623(a) 2

Fed. R. Evid. 401 ..... *passim*

Fed. R. Evid. 403 ..... *passim*

Fed. R. Evid. 404 15

Miscellaneous:

22 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5239 at 436 (2d ed. 1997)... 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Westinghouse Electric Corporation (hereinafter "Westinghouse") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit filed on September 30, 1997 is reported at 128 F.3d 128 and is included as Petitioner's Appendix A at page A-1.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was filed on September 30, 1997. This Petition for Certiorari is sought within 90 days of this judgment and is timely pursuant to 28 U.S.C. §§ 1257 and 2101(c) and Rule 10(1)(c) of the Rules of Court for the Supreme Court.

STATUTES INVOLVED

29 U.S.C. § 623(a):

It shall be unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age...

F.R.E. 401:

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

F.R.E. 403:

Although relevant, evidence may be excluded if probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. The Elimination of Ryder's Position

Plaintiff, John M. Ryder, ("Ryder" 52 years old, R. 60)[1] became a staff assistant in Defendant's Pittsburgh offices in 1983. Lucio Facchini ("Facchini" 53 years old, R. 742) became controller for Westinghouse's Power Systems Group in 1990 and "inherited" Ryder. (R. 358, 743).

Facchini's practice was to rotate his staff assistants; he had five assistants in the eight years prior to "inheriting" Ryder.

1. References to the record are noted as "(R._____)."

(R. 753). Facchini was dissatisfied with Ryder's performance;[2] he informed Ryder; and unsuccessfully searched for a position for Ryder in other Westinghouse organizations. (R. 752).

On April 6, 1993, Facchini elected to eliminate Ryder's job rather than laying him off or discharging him for cause because the job elimination made Ryder eligible for substantial financial separation benefits, which are unavailable to those laid off or discharged. (R, 793-95).[3] To ease Ryder's transition, it was agreed that he could work from the April 6 notification date until August 31, 1993. (R. 32).

As part of the restructuring process following the elimination of his position, some of Ryder's duties were assigned to Patricia Newingham, another staff assistant, who at the time was thirty-seven years old. (R. 14-15). While she performed a limited portion of Ryder's former duties, most of her responsibilities had not been performed by Ryder.[4] (R. 498, 500-02, 504, 798-99).

Ryder's legal theory of discrimination was that the elimination of his job and Facchini's dissatisfaction with his performance were pretexts for age discrimination. Ryder's argument as to pretext was based upon a document referred to as the "Chairman's Initiative Memorandum" ("Memorandum").[5]

B. The Memorandum

The Memorandum is a paraphrased summary written about two months after one of a series of meetings for managers that were held in mid-to-late 1994, more than a year

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2. For example, Ryder would not write or prepare any written charts, had poor interpersonal skills and failed to complete assigned tasks while working only the minimum hours required. (R. 762). Ryder did not receive a merit increase in the three years he worked for Facchini. (R. 766-67).

3. The parties stipulated that under the separation program, Ryder received at the time of his termination a lump sum payment of his vested pension amounting to $172,000, plus $391,027 in deferred compensation that he would not have otherwise received unless he would have worked to age sixty-five. (R. 1181-182).

4. Three months after Ryder left Westinghouse, the entire Power Systems Group was eliminated from the Company. (R. 741, 801).

5. The text of the Memorandum is included as Petitioner's Appendix B at page A-19.

after Ryder's position was eliminated (R. 447), to enable Westinghouse's president and new CEO to listen to views of managers from various operations throughout the country about the future of the Company. (R. 637-640). Although there were many attendees at the meeting, the Memorandum identifies only two: Michael Jordan ("Jordan") and Gary Clark ("Clark"), respectively, the new Chief Executive Officer and the President of Westinghouse. Jordan was hired in July of 1993. (R. 634). He was not employed by Westinghouse when Ryder's position was eliminated.

All of the other participants in the meeting were unidentified managers from different Westinghouse-owned subsidiaries and companies at various locations throughout the country. (R. 639). There was no evidence showing that Facchini (or Facchini's supervisor) attended the meeting described in the Memorandum. The meeting did not occur and comments in the Memorandum were not made until over one year *after* Ryder's position was eliminated. (R. 485-488, 447).

The Memorandum is a fifteen page single-spaced document summarizing a broad-ranging discussion covering numerous strategic, technical and business aspects of Westinghouse's future. Anonymous participants commented upon issues such as products being essentially U.S. oriented (R. 46), the true power of the Company name (R. 47), being dominated by technical people not marketing people (R. 50), the need for a strategic vision (R. 52), training (R. 55), performance evaluations (R. 54) and the desirability of different incentives as the Company moved to a flatter organization (R. 57).

This Memorandum — written two months after the meeting and over a year after Ryder's job was eliminated — was admitted into evidence over Westinghouse's strenuous objection — even though there was no nexus between the statements in the Memorandum to Ryder, *or* the decision to eliminate Ryder's position, *or* the person who made the decision, *or* the time when Ryder's position was eliminated, *or* the place where Ryder worked, *or* the department in which Ryder worked, *or* the "atmosphere" in which the decision was made.

The district court admitted the Memorandum into evidence over Westinghouse's objections under Rule 401 and

Rule 403. The district court did not balance on the record whether any probative value of the Memorandum was outweighed by its potential for unfair prejudice, confusing the issues or misleading the jury.

Once the Memorandum was admitted during the trial, Ryder's counsel conducted emotionally targeted witness examinations and made arguments that sought to create a connection for the jury between the Memorandum and the decision to eliminate Ryder's position and to Facchini when no connection existed. During cross-examination, Ryder's counsel asked Clark about one of the anonymous statements in the Memorandum. Counsel then argued in his closing that Clark conceded that the anonymous statement was ageist and that it proved Ryder was discriminated against. (R. 1288). The record was totally devoid of any connection whatsoever between this anonymous allegedly ageist statement and either Ryder or the corporate culture of the workplace in which he was employed. Yet, Ryder's counsel represented to the jury during his closing argument:

> That man sat there as president of Westinghouse Corporation and said oh, yes, Mr. Ogg, this is a discrimination statement. That's exactly what it is... ***And that is the tone and that's the atmosphere in which the Newingham-Ryder decision was made, folks, right here.***

Ryder's counsel also made this representation to the jury during his closing:

> You hear this stuff long enough and people are talking about it, it is going to infiltrate your thought process, ***and that is what happened to Lou Facchini.***

(R. 1278-1279, 1285-286) (emphasis added).

Plaintiff's counsel did this although it was undisputed that the Memorandum did not even exist until over one year after Facchini made the decision to eliminate Ryder's position, and there was no evidence linking any of the participants whose statements were summarized in the Memorandum to the location or part of the Company where Ryder was employed.

The jury returned a verdict in Ryder's favor on May 15, 1996, finding that Westinghouse discriminated against Ryder on the basis of age and awarding him back pay of $241,909.00. (R. 1333). The jury did not award Ryder front pay or liquidated damages. (R. 1334).

C. The Third Circuit Ruling

The court of appeals panel acknowledged the lack of any nexus between the remarks and the termination of Ryder, in that: (a) none of the stray remarks in the Memorandum related directly to Facchini's decision to eliminate Ryder's position; (b) the remarks were made approximately one year after that decision; (c) the remarks were by persons not involved in the decision to terminate Ryder; and (d) Jordan, the CEO, was not even employed by Westinghouse when Ryder was terminated. *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3d Cir. 1997). In spite of these findings, the court of appeals panel held that the Memorandum was properly admitted. *Ryder*, 128 F.3d at 134.

The Third Circuit collated five carefully selected excerpts from the 15-page Memorandum, constituting views aired by anonymous participants and the generalized responses of Jordan in the course of this listening session. *Id.* Significantly, no statement attributed to Jordan or the anonymous participants describes Westinghouse taking action against older workers prior to the meeting. (If anything, they reflect Westinghouse's not taking any such action).

The court of appeals held the Memorandum was admissible because: (1) the comments were made by the CEO or a manager with authority to make personnel decisions — (even though the CEO and managers neither made nor knew about the decision at issue in the trial); (2) the comments were made in reflection on past managerial viewpoints with an eye towards future change; and (3) if the jury believed the comments reflected managerial attitudes that were in existence when Ryder's job was eliminated in April 1993, the Memorandum would make the existence of a discriminatory motive more likely. *Id.* at 133.

The Third Circuit concluded that the Memorandum would not have unduly prejudiced Westinghouse because the jury could not be confused into concluding that the statements were made before the decision was made to eliminate Ryder's position. *Id.* at 134. In spite of the lack of any evidence of balancing in the trial record, the court of appeals held that the trial court did not act arbitrarily in concluding that the relevancy of the Memorandum outweighed any unfair prejudice to Westinghouse. *Id.* at 133.

D. The Jury Instructions

The district court gave conflicting instructions as to the law of age discrimination. It erroneously instructed the jury that disbelief of Westinghouse's reason for eliminating Ryder's position is what is meant by a "pretext" for illegal discrimination and that a finding of pretext required a verdict against Westinghouse. *Id.* at 137. The trial court also instructed the jury correctly that the burden was on Ryder to prove age discrimination.

There is no dispute as to which key portions of the charge were correct and which were incorrect. The portion in **bold face** in sentence [1] is incorrect. The portion in **bold face** in sentence [2] is misleading when read with sentence [1].

The pertinent portions of the charge are as follows:

> . . . If you find that Westinghouse articulated legitimate, nondiscriminatory reasons for eliminating plaintiffs [sic] job, then you must determine whether the plaintiff, John Ryder, has proven by a preponderance of evidence that the reason or explanation given by the defendant was not the real or true reason behind Westinghouse's action in terminating Mr. Ryder's employment.
>
> **[1] In this area of the law, an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a pretext for illegal discrimination. [2] If you find that Mr. Ryder has proven by a preponderance of the evidence that the defendant, West-**

> **inghouse Electric Corporation, used the elimination of plaintiff's job as an excuse or pretext for discriminating against him on the basis of his age, then your verdict will be for Mr. Ryder, the plaintiff.**
>
> On the other hand, if you find that the explanation offered by Westinghouse Electric Corporation . . . were [sic] legitimate reasons for plaintiff's termination, and that plaintiff has not proven by a preponderance of evidence that age was a determining factor in the termination of his employment, then your verdict will be for the defendant, Westinghouse Electric Corporation.
>
> In making the determination, you should be aware of the following: The burden of proving discrimination always remains with the plaintiff, John Ryder, to prove that he was a victim of age discrimination. . . . Your job is to determine whether Westinghouse discriminated against Mr. Ryder on the basis of his age.

(R. 1235-1236) (numbers and emphasis added).

The trial court, after giving these inconsistent statements of the law, gave no curative instruction. It is not possible to determine whether one or more jurors based their verdict upon the erroneous definition of pretext or the more general instruction given later that Ryder was required to prove that his age was a determining factor in his termination.

The court of appeals panel agreed that the district court's instruction that a finding of pretext meant Westinghouse illegally discriminated was erroneous. *Id.* However, the court held that the error was "offset" by the correct instructions and that "as a whole," the instructions provided the jury with adequate guidance and hence, there was no plain error.[6] *Id.* The Third Circuit made no reference to and apparently did not consider the district court's failure to give a curative instruction.

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6. The Third Circuit held that Westinghouse did not present its objection to the jury instruction described above and therefore evaluated the instruction under a plain error standard. *Id.* at 136.

REASONS FOR GRANTING THE WRIT

I.

The Circuits' Conflicting Decisions on Admissibility of "Stray Remarks" Purporting to Show Discriminatory Attitudes or Corporate Culture, Which Lack Any Nexus to the Employment Action But Have Unfair Prejudicial Impact, Requires Resolution.

Despite the plethora of employment discrimination cases, and despite the inevitable assertion by plaintiffs' counsel in such cases that various stray remarks in the workplace demonstrate discriminatory managerial attitude or corporate culture, there is no uniform standard for evaluating admissibility among the circuits and little consistency within individual circuits.

Currently, there is a distinct conflict between the Third Circuit and the First, Fourth, Sixth, Seventh and Tenth Circuits on the legal question of whether stray remarks of an arguably discriminatory nature by corporate officials are admissible in an age discrimination case when there is no evidentiary foundation or nexus linking the comments or attitudes to the specific employment decision involved in the case.

The First, Fourth, Sixth, Seventh and Tenth Circuits have held that stray comments are not admissible in the absence of an evidentiary link or nexus to the specific employment decision involved in the case.

The requirement of a nexus between the comments to be admitted and the employment decision at issue is highlighted by Judge Posner's well-reasoned opinion in *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991). In *Fortino,* the trial judge admitted a videotaped speech of Omoto, the marketing manager of Quasar's Television Group. In his speech, Omoto stated: "because of a change in our TV Group organization at Headquarters, our average age of employees has become a lot younger [and] . . . that means we will be ready to spend many hours, day and night, to help you out in your work." *Fortino,* 950 F.2d at 395. Since the plaintiffs were not in the Television Group and Omoto played no role in their discharge, Judge Posner reasoned that his comment about age "had no proba-

tive value and, being prejudicial, was inadmissible." *Id.* Judge Posner explained: " '[A]ctions and comments by employees not involved in a discharge decision cannot provide a basis for charging other employees with discrimination.' " *Id., quoting Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1155 (7th Cir. 1989).

Likewise, the Tenth Circuit held in *Touchet v. Halliburton Co.*, 1996 U.S. App. LEXIS 3353, *12-16 (10th Cir. 1996) that a district court erred where testimony had been admitted concerning an ageist statement made by a company supervisor because there was no evidence the supervisor had any effect on the challenged employment decision. The court stated: "[A] plaintiff must demonstrate that a *nexus exists* between the discriminatory comment to be admitted and the allegedly discriminatory action to be proven. Even comments by a supervisor involved in the allegedly discriminatory actions are not admissible unless connected to the discriminatory actions themselves." *Id.* (emphasis added).

The Fourth Circuit held in *O'Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 549 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 878 (1996) that a decisionmaker's statement to the plaintiff two weeks prior to his termination that "you are too damn old for this kind of work" did not show discriminatory intent without evidence that it was made in the context of plaintiff's termination. Similarly, the Sixth Circuit held in *McLaurin v. Fischer,* 768 F.2d 98, 104 (6th Cir. 1985) that the district court had properly excluded a letter authored by the decisionmaker referring to "young men whom we would like to attract." The court ruled that the letter had little, if any, relevance to the plaintiff's discharge and was unduly prejudicial. Likewise, the First Circuit in *Conway v. Electro Switch Corp.*, 825 F.2d 593 (1st Cir. 1987) held that the district court properly allowed into evidence statements by the company's president and its industrial relations manager that evidenced gender bias, but only because a connection did exist between those persons and plaintiff's termination.

In contrast to the other circuits, in the decision here and in other cases, the Third Circuit endorsed the admissibility of comments by decisionmakers and non-decisionmakers for the

purpose of proving discriminatory management attitudes or corporate culture — without requiring proof of a nexus or evidentiary link to the specific employment decision involved in the litigation. *See, e.g., Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 333 (3d Cir. 1995) ("We have held that a supervisor's statement about the employer's employment practices or managerial policy is relevant to show the corporate culture in which a company makes its employment decision and may be used to build a circumstantial case of discrimination.") Thus, the Third Circuit would admit into evidence what the First, Fourth, Sixth, Seventh and Tenth Circuits exclude.

Here, the Third Circuit ruled that "a plaintiff may offer circumstantial proof of intentional discrimination on the basis of age in the form of a supervisor's statement relating to formal or informal managerial attitudes held by corporate executives," although it acknowledged that there was no evidence of any connection with: (a) Ryder's termination of employment; or (b) the persons involved in the decision to terminate plaintiff's employment; or (c) the employment practices at the plaintiff's workplace location. *Ryder,* 128 F.3d at 132-133. As to none of the above was there any nexus.

Under the Third Circuit's approach, the evidence that was inadmissible in *Fortino v. Quasar Co., supra,* would have been admissible because Omoto was a corporate manager and his suggestion that young people work longer hours would provide some evidence of "corporate culture or attitude." The Third Circuit upholds the admission of unrelated statements simply because of the positions of the declarants in the company, as opposed to any connection in person, time or location to the alleged discriminatory employment decision.

Even within individual circuits, the courts have followed blatantly inconsistent approaches concerning stray comment evidence. Compare *McLaurin v. Fischer, supra,* which excluded a letter by the decisionmaker with *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1332 (6th Cir. 1994), in which the court held that it was not an abuse of discretion for the trial judge in an age discrimination case to admit a statement made

by the chief executive officer when he was a teenager to the effect that "all old people should be kept in concentration camps."

The Third Circuit also has panels in disagreement. In *Ezold v. Wolf, Block, Schorr and Solis-Cohen,* 983 F.2d 509, 545 (3d Cir. 1992), the Third Circuit reversed a trial judge's finding of discrimination as clearly erroneous. The Court held that since the law firm department chair's comments were temporally remote, and since he was no longer with the firm when plaintiff was denied partnership and was not a final decision-maker, his statements could not support finding in plaintiff's favor, stating as follows:

> *Stray remarks by non-decisionmakers or by decision-makers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision. See Hopkins,* 490 U.S. at 277, 109 S.Ct. at 1804 (O'Connor, J., concurring); *Frieze,* 950 F.2d at 541; *Guthrie v. Tifco Indus.,* 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied,* ___ U.S. ____, 112 S.Ct 1267, 117 L.Ed.2d 495 (1992). We decline to depart from this principle in the present case.

983 F.2d at 545 (emphasis added). Thus, even the Third Circuit sometimes concedes that in the absence of nexus to the specific employment decision involved, stray comments lack probative value in a discrimination case.

There is also widespread disagreement within other federal courts on the basic question of whether stray unrelated comments have any probative value in supporting a prima facie case of intentional age discrimination under *McDonnell Douglas Corp v. Green,* 411 U.S. 792 (1973). For example, in *Wilde v. Florida Pneumatic Mfg. Corp.,* 941 F. Supp. 1203 (S.D. Fla. 1996), the court, in its search for the proper analytic framework, identified three distinct analytical approaches among the various circuits. *Id.* at 1206-1207. Under these unpredictable precedents, it is little wonder that practicing lawyers and judges have difficulty determining the legal standard to be applied.

The question of the probative value of stray comments goes to the very heart of whether such comments should be admitted into evidence at trial. If stray comments with no nexus to the specific employment decision have no probative value on the question of discriminatory intent (as most of the circuits that have considered questions have held), then the comments should not be admitted into evidence. As Judge Posner perceptively concluded in *Fortino, supra,* stray comments must be excluded from evidence when they have no probative value, because there is nothing to balance against their prejudicial effect.

Even apart from this important doctrinal inter-circuit conflict, there are three other related reasons why certiorari is merited in this case:

(a) U.S. Supreme Court's Supervisory Role. Rulings by trial courts on evidentiary issues are typically reviewed on an "abuse of discretion" standard, *see, e.g., General Elec. Co., et al. v. Joiner,* ____ U.S. ____,1997 U.S. LEXIS 7503 (December 15, 1997), and we do not suggest any change. However, this Court has exercised its supervisory role to clarify the federal law of evidence governing what are ordinarily discretionary rulings. *See, e.g., Daubert v. Merrel Dow Pharms., Inc.,* 509 U.S. 579, 589 (1993) (clarifying the standard governing the admissibility of scientific expert testimony under Federal Rule of Evidence 702). Here, as in *Daubert,* there is a need for this Court to resolve the conflicting approaches and identify the controlling evidentiary principles under Rules 401 and 403 to be applied in the federal courts in this genre of frequently litigated cases.

Leaving the issue of admissibility to the gatekeepers without Supreme Court guidance will perpetuate conflicting rulings on the law. This Court should set the legal standard by which the district courts should open or close the gate. After this Court specifies the standard and identifies the controlling legal considerations governing admissibility of stray comments, appeals to circuit courts will be reduced and all appellate reviews will then turn upon an abuse of discretion standard established by this Court. This Court recently achieved this very result in *Joiner, supra.*

(b) Public Importance. Although this Court cannot resolve every controversy in the law of evidence, this is an issue of public importance and special sensitivity. In today's enlightened, but "politically correct" climate, most Americans rightly condemn discriminatory remarks or attitudes by corporate officials, which is why "stray comments" are inherently prejudicial and inflammatory. But, if the ticket of admissibility comes with nothing more than a vacuous invocation of the phrase "relevant to corporate attitudes or culture," with no requirement of a nexus in time, place or person to the specific employment decision involved in the litigation, then the potential for appeals to jurors' emotions and prejudice is enormous and uncontrollable. The consequence of this approach is that employers will pay the price of that ticket by being punished for having managers who are politically incorrect, regardless of whether they violated the anti-discrimination laws.

(c) The Record in This Case. The instant case presents an excellent record for the Court to clarify this area of law because the trial judge admitted over Westinghouse's *in limine* objection two distinct types of "stray comments." The Memorandum included: (1) isolated, but prejudicial inflammatory comments by anonymous mid-level corporate executives with no connection to plaintiff; and (2) generalized comments by a chief executive officer (Mr. Jordan), who was hired approximately three months after the decision to terminate Ryder's employment. Both types of evidence are classic types of "stray comments," which this Court can use to identify, analyze and clarify the controlling evidentiary standards.

* * *

The "nexus" standard adopted by the First, Fourth, Sixth, Seventh and Tenth Circuits is surely the correct legal test. If there is no evidentiary foundation to connect the stray remark and the employment decision, then it has no probative value and it must be excluded under Rule 401, or at the very least as prejudicial under Rule 403. To assert, as the Third Circuit did in this case, that the evidence is being offered "only" to show a discriminatory corporate attitude or culture, with no

nexus to the specific employment decision, violates basic principles of the law of evidence under both Rules 401 and 403.

The Advisory Committee Notes to Rule 401 point out that relevancy "is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable to the case." The trial court and the Third Circuit considered the remarks to be inherently relevant, ignoring whether there was a relationship (nexus) between the purported evidence and the matter to be proved. The test used in the First, Fourth, Sixth, Seventh and Tenth Circuits requires the "relation" specified in the Advisory Committee Notes that the Third Circuit ignored.

In the absence of such a nexus, admission of stray comments to prove a discriminatory corporate attitude or culture is nothing more than an attempt to persuade the jury that a corporate employer discriminated in a specific decision because it spoke or acted in a discriminatory manner on another occasion or occasions. Yet, "it has long been accepted in our law that the doing of one act is in itself *no evidence* that the same or a like act was again done by the same person." 22 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5239 at 436 (2d ed. 1997) (emphasis added; internal quotation and ellipses deleted). Such propensity or "character evidence is of slight probative value and may be very prejudicial . . . . It subtly permits the trier of fact . . . to punish the bad man . . . despite what the evidence in the case shows actually happens." Fed. R. Evid. 404 Advisory Committee Notes (internal quotation and citation omitted). It is only when there is evidence that connects the stray comment or attitude to the specific employment decision that the evidence becomes proper and admissible.

The initial question for any court (which was completely ignored in this case by the district court and the court of appeals) must be whether the alleged stray comment has any meaningful probative value on the ultimate question of whether the employer made the decision to terminate the plaintiff for a discriminatory reason. If the answer is "no," then there is no probative value, and the stray comment should be excluded. If the answer is "yes," then the court pro-

ceeds to the normal Rule 403 balancing of probative value against "danger of unfair prejudice, confusion of the issues, or misleading the jury." Further, this balancing must be conducted on the record so that it is possible for the reviewing court to determine whether the trial court fulfilled its obligation as gatekeeper in the screening of evidence or whether it abused its discretion.

Congress did not enact any law making political incorrectness or isolated discriminatory comments by managers or proof of lack of sensitivity in corporate culture illegal. Discriminatory actions, not unrelated managerial attitudes, are illegal. Evidence of attitudes, whether of managers or through corporate culture, must be connected to an alleged discriminatory action in order to avoid putting the attitudes themselves on trial.

For all of these reasons, this is a "cert-worthy" legal issue in which this Court can and should identify the controlling evidentiary principles governing the admissibility of "stray comment" evidence under Rule 401 as a predicate for the further analysis required under 403 of the Federal Rules of Evidence.

II.

All Circuit Courts Should Be Mandated to Remand — As a Majority of Circuits Do — Where Conflicting Jury Instructions on the Same Key Legal Point Make It Impossible to Determine If the Jury Based Its Verdict on the Correct or Erroneous Instruction.

An underlying assumption vital to the judicial system is that "juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury . . . ." *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (opinion of Rehnquist, J.). The issue here is the standard circuit courts are to apply when reviewing instructions that state a particular standard both erroneously and correctly. It is not exacting enough to ensure the integrity and efficacy of a trial by jury merely to invoke (like a mantra) "reviewing the instructions as a whole" and attempting to divine whether

the jury was misled. But, that kind of divination and guess work is exactly what the Third Circuit did here.

The court of appeals in this case determined that the district court erroneously defined "pretext for illegal discrimination" in one of its key instructions to the jury. *Ryder,* 128 F.3d at 137. In spite of failing to state the law correctly, the court below concluded that the misstatement of law was "offset" by the district court's subsequent correct instruction regarding Ryder's burden of proof in general terms. *Id.* Similarly, the Sixth Circuit in *O-So Detroit, Inc. v. Home Ins. Co.,* 973 F.2d 498 (6th Cir. 1992) found that a portion of the jury instruction was erroneous, yet did not require remand because other portions of the instruction were correct and, read as a whole, the inclusion of the erroneous portion was "harmless." *O-So*, 973 F.2d at 502. This analysis is markedly different from that which the Second, Fourth, Eighth, Eleventh and Federal Circuits have applied and indeed, is different from that which the Third and Sixth Circuits have previously endorsed.[7]

Contrary to the Third and Sixth Circuit view, this Court and the Second, Fourth, Eighth, Eleventh and Federal Circuits have recognized that when a judge makes an incorrect statement of the law to the jury and in other parts of the instructions states it correctly, remand is required because it cannot be determined whether the jury followed the right instruction or the wrong one. *Francis v. Franklin,* 471 U.S. 307 (1985). "Language that merely contradicts and does not explain a constitutionally infirm instruction will not absolve the infirmity. A

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7. In *Moreau v. Pennsylvania R.R. Co.,* 166 F.2d 543 (3rd Cir. 1948), the Third Circuit held that where a district court makes both an incorrect and correct statement of the law, it may be corrected "only (1) by making a definite statement of the correct rule to guide the jury and (2) making it clear to the jury that it should substitute the later correct statement for the former erroneous one." *Id.* (citation omitted). In *Sessoms v. Union Sav. & Trust Co.,* 338 F.2d 752 (6th Cir. 1964), the court held that "as a rule, a misdirection is not cured by a subsequent statement of a correct principle, unless the judge calls the jury's attention to the incorrect statement and retracts or modifies it, or unless the context shows that one charge is in fact a correction or modification of the other." *Id.* at 757-78 (citation omitted).

reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis*, 471 U.S. at 322.

The Second Circuit in *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26 (2d Cir. 1997), an age discrimination case, held that the trial court did not cure its earlier erroneous instruction by a correct general instruction stating the plaintiff's burden of proof. *Thornley*, 104 F.3d at 30. Because "[it could not] be confident that the jury did not rest its verdict" on the erroneous charge, the case was remanded. *Id.* at 30, 32.

The Eleventh Circuit in *Blossom v. CSX Transp., Inc.*, 13 F.3d 1477 (11th Cir. 1994) recognized that a proper jury instruction "cannot cure an improper one if there is a possibility that the jury employed the improper rule . . ." and, therefore, where there are "[t]wo contradictory standards of liability . . . we cannot say that the jury followed the proper rule." *Blossom*, 13 F.3d at 1480, *quoting Johnson v. Bryant*, 671 F.2d 1276, 1281 (11th Cir. 1982). "Because we are uncertain as to whether the jury was misled by the district court's erroneous instruction," the court concluded, "these instructions cannot be harmless" *Id.*

Similarly, the Federal Circuit Court in *Jamesbury Corp. v. Litton Indus. Prod.*, 756 F.2d 1556 (Fed. Cir. 1985) ruled that "more is required of jury instructions than to state the law correctly somewhere in the instructions." *Jamesbury*, 756 F.2d at 1560. The *Jamesbury* court ruled that, taken as a whole, the incorrect instruction and subsequent correct instruction was "at best confusing and continues to erroneously vary the quantum of proof." *Id. See Smalley v. Duluth, W. & Pac. Ry.*, 940 F.2d 296, 298 (8th Cir. 1991) ("if two or more conflicting statements of law are suggested, it cannot be presumed that the jury followed the proper rule"); *Spartanburg County Sch. Dist. v. Nat'l Gypsum Co.*, 805 F.2d 1148, 1151 (4th Cir. 1986) (citation omitted) (erroneous instruction on law for breach of implied warranty was not rendered harmless by second, correct instruction because "merely superimposing correct instructions over erroneous ones serves only to foster prejudice and confusion"). *See also Houston v. Herring*, 562 F.2d 347, 348 (5th Cir. 1977) (conflicting instructions created suffi-

cient opportunity for jury confusion; "erroneous instructions are not cured by correct instructions in other portions of the charge when 'the charge leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberation' ").

The Ninth Circuit presents the most explicit guidance, requiring remand in the absence of an explicit corrective instruction. In *Seltzer v. Chesley*, 512 F.2d 1030, 1035 (9th Cir. 1975), the Ninth Circuit made it clear that when a jury instruction contains both correct and incorrect statements of the law, erroneous instructions "can be corrected by the trial judge only by expressly correcting them and by directing the members of the jury to expunge the erroneous statements from their minds" (citation omitted). The *Seltzer* court upheld a curative jury instruction that met this standard by specifically calling to the jury's attention an error in the instruction on contributory negligence and "distinctly and particularly point-[ing] out what the law was." *Id.* at 1036.

The critical issue for review is whether the jury made its decision using the correct legal standard. Where the law has been described both correctly and incorrectly, there is no way to resolve that question. Here, the district court never informed the jury that it defined "pretext" incorrectly and that mere disbelief of the employer's reason does not necessarily constitute a pretext for illegal discrimination. Each time the word "pretext" was used by the court, the erroneous definition was implicitly re-affirmed and therefore logically continued to mislead the jury. Then correct instructions were given. Did the district court's erroneous definition of "pretext for illegal discrimination" provide the basis for the verdict or confuse the jury? How could anyone ever divine the answer?

Put in a simple analogy, suppose the court below instructed a jury twice that the burden of proof is on the plaintiff and once that the burden of proof is on the defendant. Which instruction should the jury follow? Contrary to the holding below, jury instructions are not viewed in a quantitative calculus of a greater number right than wrong. The Third Circuit approach results in ad hoc decision making, with courts forced to "count" the number of correct instructions

and compare the total with the number of incorrect instructions, straining to "intuit" from the jury instructions "as a whole" which instruction was followed. *Francis*, 471 U.S. at 323 n.8. If the jury follows the instruction that is wrong, it can not matter how many times the district court also gave the correct instruction.

This Court has acknowledged the importance of providing an explicit curative instruction, recognizing that there is no opportunity for confusion by the jury where the trial judge brings the earlier error to the jury's attention and explicitly states the correct law. *Mercer v. Theriot*, 377 U.S. 152, 154 (1964) (where the "re-instruction . . . properly stated the law . . . it would have remedied any erroneous impression the jury may have received from the first instruction").

The rule enunciated in the other circuit court decisions cited above differs from that in the Third Circuit. This Court should grant certiorari to correct the Third Circuit's decision and to provide guidance to all trial and circuit courts by adopting the "bright-line test" that when a jury's instructions on key elements contain both an incorrect and a correct statement of the law, an explicit curative instruction must be given to eliminate jury confusion, or a new trial is required.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asserts that its Petition for a Writ of Certiorari should be granted.

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APPENDICES

Filed September 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3414

JOHN M. RYDER

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 93-cv-01945)

Argued April 14, 1997

Before: GREENBERG, ALITO and SEITZ, *Circuit Judges.*

Filed: September 30, 1997

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

Defendant, Westinghouse Electric Corporation ("Westinghouse"), appeals from a judgment, entered on a jury verdict, in favor of Plaintiff, John M. Ryder ("Ryder"). This action is based on the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994) ("ADEA").

and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951-963 ("PHRA").[1]

Ryder was employed as a staff assistant to the group controller for Westinghouse's Power Systems Group from 1983 until April 6, 1993. Prior to assuming this position, Ryder had been employed at Westinghouse in various other capacities since January 7, 1963. On April 6, 1993, Lou Facchini ("Facchini"), who had been the group controller for the Power Systems Group since 1991 and who had "inherited" Ryder from the previous controller, terminated Ryder's employment under Westinghouse's permanent job separation program.[2] At the time of his termination, Ryder was fifty-two years old.

Two days after leaving Westinghouse, Ryder filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging that Westinghouse wilfully terminated him because of his age. After waiting for the required time periods to elapse, Ryder filed his complaint in the district court on November 11, 1993. A two-week jury trial concluded with the jury's verdict in favor of Ryder, and with an award in the amount of $241,909. Westinghouse filed this timely appeal.

Westinghouse attacks the district court's management of the trial in two separate respects, each of which, Westinghouse submits, requires us to reverse the judgment and remand this case for a new trial. We turn to those issues.

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1. The district court exercised subject matter jurisdiction over Ryder's ADEA claim pursuant to 29 U.S.C. § 623(a), 626(c)(1) and 28 U.S.C. § 1331, and based jurisdiction over Ryder's PHRA claim on 28 U.S.C. § 1367. We have jurisdiction under 28 U.S.C. § 1291.

2. Facchini testified that he terminated Ryder only after trying unsuccessfully to place him elsewhere in the company. Westinghouse explained that by eliminating Ryder's position, as opposed to terminating him for cause or laying him off, it could offer Ryder a permanent job separation. The parties stipulated that under this arrangement, Ryder received, at the time of his termination, a lump-sum payment of his vested pension benefit amounting to $172,000, along with a payment of $391,027 in deferred compensation. By mutual agreement of the parties, Ryder actually continued in his position until August 31, 1993.

I.

Admission of the "Chairman's Initiative Memorandum"

Westinghouse first challenges the admission of the so-called "Chairman's Initiative Memorandum," which was authored by Michael Jordan, Westinghouse's CEO, and which contained allegedly ageist comments made by unidentified Westinghouse executives who were authorized to make personnel decisions.[3] These comments were made at a series of meetings attended by Jordan, who became CEO in June of 1993, approximately two months after Ryder's "official termination." Also in attendance was Gary Clark, who was acting as CEO when Ryder was terminated, and who became president of the company after Jordan was hired.

The controversial comments reflected in the memorandum were made at a meeting held on July 6-7, 1994, the topic of which was "Employee Selection Development Rewards and Costs." App. at 54. Jordan's memorandum was distributed to "All Previous Attendees of Chairman's Initiative," and included his introductory comments that the summaries contained "some good ideas" and were "long, but valuable." *Id.* at 45. Some of the allegedly ageist comments included:

> Participant: In many of our businesses we have an older workforce. As a result, that workforce gets a higher salary. Additionally, our low growth businesses can strain opportunities for younger workers. Somehow we must provide those opportunities. We have to get the

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3. Facchini, who attended some but not all of the meetings, testified at trial that those in attendance were of the "general manager" level, who "ma[d]e decisions as far as hiring and firing people." App. at 426. Based on this testimony, the district court noted that the attendees had "hiring and firing responsibilities." *Id.* at 430.

"blockers" out of the way.

. . . .

Participant: Westinghouse has been pretty paternalistic in the past and we've ended up with too much dead wood in the organization.

Jordan: Yes, and that's a big issue because as you squeeze the infrastructure, you want your best talent to stay in the organization.

. . . .

Participant: We really haven't hired much over the last 10-15 years. As a result, we have a hole in terms of people development. We don't have enough people in the organization ages 30-40. Somehow we have to anticipate what our requirements are for people three years down the road and be willing to hire people for the future.

Jordan: That's the issue at many business units. You have to have regeneration.

. . . .

Participant: Blockers are always an issue but they're less of an issue when you are in a growth mode. Removing blockers is very important when you're in a downsizing mode because you don't have the kinds of opportunities that growth provides you.

Jordan: People down in the organization know who they are. . . . [W]e have to put ourselves in a position of getting high pots into more responsible jobs and move the blockers aside. That's hard to do, and no one likes to do it, but we're paying the price now for our inability to do it in the past.

. . . .

Jordan: What we need to do as the leadership of this organization, is force ourselves to those standards so that the best persons get into the right positions. An eager high-energy person will get more done in one month than someone who has retired in place will do in one year.

. . . .

Jordan: We seem to be missing the people in the middle of the age range who have talent, the willingness and the horsepower to take on risky change projects. We don't have those types pushing up from the bottom. We have a kind of regeneration gap here. We have to have those kinds of people. Not only are these individuals the leadership of tomorrow, these are the people that create ferment down in the ranks that pushes against the status quo in the system.

App. at 54-59.[4]

Westinghouse contends that any relevancy that this document may have to Ryder's termination one year prior to the chairman's initiative meeting is substantially outweighed by its highly prejudicial nature. Westinghouse also argues that the document constitutes inadmissible hearsay. Ryder responds that the document was properly admitted as circumstantial evidence of the corporate culture existing when Ryder was terminated one year earlier.

We review the district court's evidentiary rulings for abuse of discretion. *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1076 (3d Cir. 1996) (*en banc*), *cert. denied*, 117 S. Ct. 2532 (1997). We will not disturb the district court's application of a balancing test under Federal Rule of Evidence 403 unless it is "arbitrary and irrational."

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4. At trial, Facchini agreed with Ryder's counsel's characterization of a "blocker" as "somebody who is preventing somebody younger from getting through to another executive level...." App. at 482.

Abrams v. Lightolier Inc., 50 F.3d 1204, 1213 (3d Cir. 1995) (internal quotations and citations omitted).[5]

We have recognized that a plaintiff may offer circumstantial proof of intentional discrimination on the basis of age in the form of a supervisor's statement relating to formal or informal managerial attitudes held by corporate executives. *See, e.g., Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 333 (3d Cir. 1995); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989). We have noted that it is often crucial to the jury's assessment of whether the employer's reasons were pretextual and the ultimate question whether the employer intentionally discriminated against an employee. *Antol v. Perry*, 82 F.3d 1291, 1302 (3d Cir. 1996). Its importance seems to become ever more critical as sophisticated discriminators render their actions increasingly more subtle to circumvent adverse judicial precedent. *See Sheridan*, 100 F.3d at 1071; *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996).

In resolving whether these comments were properly admitted, we can take guidance from our decisions in

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5. We decline Westinghouse's invitation to exercise plenary review of this issue on the basis that the district court failed to make explicit its Rule 403 balancing analysis.

Our review of the record indicates that Westinghouse raised its Rule 403 objection in its pre-trial pleading entitled, "Defendant's Opposition to Plaintiff's Second Supplemental Pretrial Statement and Offer of 'Chairman's Initiative' Exhibit." Supp. App. at 1341, 1348-49. The basis for the objection was that the comments were not probative because they post-dated the termination by approximately one year and did not suggest a corporate culture aimed at eliminating older workers. The comments were highly prejudicial because they would sway the jury's focus from events at the time of Ryder's termination and invite the jury to react irrationally given the negative public opinion of corporate reorganizations.

Although not expressly citing Rule 403, the district court addressed both concerns in ruling on the admissibility of the memorandum. App. at 131-34, 467. Based on our review of the record, we think that the district judge's analysis was sufficiently explicit here. *See In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 457 n.8 (3d Cir. 1997); *Sheridan*, 100 F.3d at 1076 n.10.

Lockhart, 879 F.2d at 54, and *Brewer*, 72 F.3d at 333-34. In *Lockhart*, we held that an ageist comment made by the senior-most executive of one of the four Westinghouse Credit Corporation divisions was relevant to the company's atmosphere or culture when the plaintiff was terminated approximately one year earlier. 879 F.2d at 54. Even though this executive did not occupy his post at the time of the plaintiff's termination and did not comment specifically about and was not involved in dismissing the plaintiff, we reasoned that a jury could read his comment as reflecting a "cumulative statement of managerial policies" that had been effectuated by other high ranking company executives for "a considerable time." *Id.* We concluded that an executive of such stature in the organization was likely to be aware of the prevailing atmosphere even if he did not participate in a particular termination.

In *Brewer*, we confronted the admissibility of Quaker State's CEO's description in a company newsletter of two new executives as "two of our star young men in their mid-40s. That age group is our future." 72 F.3d at 333. We held that this comment was a "stray remark" because the CEO played no role in the termination decision at issue and he made the remark nearly two years prior to the plaintiff's termination. *Id.* Nonetheless, we found it relevant as probative of informal managerial attitudes. This was particularly so because the remark was written by the CEO, and thus, was "not an off-hand comment made by a low-level supervisor." *Id.* at 334. We concluded that the question whether the comment was entitled to any — and how much — weight as circumstantial evidence of discrimination was for the factfinder.

This is not to say that an ageist statement made by any corporate executive is relevant as evidence of "corporate culture," which would circumstantially prove a discriminatory animus. Rather, the court must, as we did in *Lockhart* and *Brewer*, evaluate factors pertaining to the declarant's involvement in recognizing a formal or informal managerial attitude, including the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action.

In the case at bar, none of the comments contained in the memorandum relate directly to Facchini's decision to terminate Ryder. They were made approximately one year after the fact by individuals not involved in the decision. Neither of the foregoing facts renders the comments irrelevant, however. The comments were made by either the company CEO or by executives with authority to render personnel decisions. Moreover, the comments were made in reflection on past managerial viewpoints at Westinghouse with an eye toward future change. If the jury were to believe that these comments accurately reflected a then existing managerial attitude toward older workers in April 1993, this evidence would make the existence of an improper motive for Ryder's termination more probable. Fed. R. Evid. 401; *Brewer*, 72 F.3d at 333-34; *Abrams*, 50 F.3d at 1214-15; *Lockhart*, 879 F.2d at 54. *See also Walden v. Georgia-Pacific Corp.*, No. 96-7045, slip op. at 23-25 (3d Cir. Sep. 26, 1997) ("stray remarks" made by individuals outside the employer's decision-making process may nevertheless constitute admissible evidence of managerial atmosphere and a possible discriminatory intent).

The remaining question, then, is whether the district court acted arbitrarily and irrationally in concluding that the relevancy of these comments is not substantially outweighed by the dangers of unfair prejudice or misleading the jury, given the statements' temporal remoteness and the fact that the speakers were not involved in Ryder's termination. Certainly, their relevancy is somewhat diminished by the fact that they were not made by the individuals who terminated Ryder. *Cf. Abrams*, 50 F.3d at 1215 (negative comments by a decision maker are often the strongest circumstantial evidence of discrimination). Their relevancy is conversely enhanced by the fact that many of the statements (and seemingly the more controversial ones) were made by the CEO himself. *Brewer*, 72 F.3d at 333-34.

In this regard, we agree with Westinghouse that a CEO's comments are likely to be reviewed carefully by a jury; as noted in *Lockhart*, "[w]hen a major company executive speaks, 'everybody listens' in the corporate hierarchy...." 879 F.2d at 54. Although he spoke approximately one year after Facchini decided to terminate Ryder, Jordan had

served as CEO since July 1993, approximately one month before Ryder left Westinghouse. He had a basis for knowledge of the existing managerial viewpoints during the relevant time period. As to the other participants, it is clear that they were discussing past practices at Westinghouse.

In any event, we conclude, as we did in *Lockhart*, that these statements may have reflected a cumulative managerial attitude that had been held for "a considerable time." 879 F.2d at 54. Therefore, we cannot say that the district court acted arbitrarily and irrationally in its finding that any unfair prejudice did not outweigh the relevancy of the comments based on their temporal remoteness or on the fact that the speakers were not involved in Ryder's termination.[6]

We also believe that the jury would not have been confused by the fact that these comments were made one year after Ryder's termination. They were expressly offered to illustrate the pervasive ageist managerial attitude when Ryder was terminated, and Westinghouse clarified this temporal factor on cross examination. Consequently, we conclude that the district court did not act arbitrarily and irrationally in balancing these competing interests in favor of admissibility.

We also reject Westinghouse's argument that these statements constitute inadmissible hearsay. Ryder offered these statements into evidence as circumstantial proof of the managerial viewpoint on "blockers" that prevailed when Ryder was terminated. Thus, we find that the statements were not offered to prove the truth of the matters asserted.[7]

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6. We think likewise as to any prejudice resulting from the allegedly negative public perception of corporate reorganizations. Such a generalized view is too speculative to support the conclusion that the introduction of a document that Westinghouse contends in its brief evinces no age animus was unfairly prejudicial because it would cause the jury to act irrationally.

7. For instance, Jordan's statement that "[a]n eager, high energy person will get more done in one month than someone who has retired in place will do in one year" was not offered for its truth. Instead, it was offered to illustrate the CEO's state of mind on the issue of unproductive (and seemingly older) individuals. Fed. R. Evid. 801(c); *see also id.* 803(3). This reasoning applies to the other comments as well.

Even if the statements were offered to prove the truth of the matters asserted, we nevertheless would conclude that they were admissible as exceptions to the definition of hearsay. First, the statements made by Jordan at the meeting and summarized in the memorandum were admissions by the agent of Westinghouse. Fed. R. Evid. 801(d)(2)(D). Jordan was speaking as the CEO of Westinghouse to a group of Westinghouse executives about personnel matters over which these executives exercised authority. Thus, he spoke as Westinghouse's agent within the scope of his employment. *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1001-02 & n.6 (3d Cir. 1988).

Jordan's summarization of the statements made by the unidentified participants presents a "double hearsay" problem. For these comments to have been properly admitted then, we must find each level of hearsay to fall within some applicable exception. Fed. R. Evid. 805. As we noted above, in summarizing these statements in a memorandum sent to all meeting attendees, Jordan acted within the scope of his employment as CEO of Westinghouse. Thus, his recitation of the statements is an admission by a party-opponent under Federal Rule of Evidence 801(d)(2)(D). *See Carden*, 850 F.2d at 1001-02 & n.6.

We find this exception to apply to the actual utterances of these statements by the unidentified meeting participants as well. The speakers, though unidentified by name or specific title, were all Westinghouse executives who had authority to make personnel decisions. They acted within the scope of their employment in stating their views on the state of their workforce at the request of the company CEO. Thus, the sources of the statements are identified sufficiently to establish that they were made by agents of Westinghouse acting within the scope of and during the existence of their employment relationship. *See Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1373 (3d Cir. 1992).[8] Based on the foregoing

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8. As to this level of hearsay, we find our decision in *Carden* to be distinguishable. There, we held that a supervisor's statement to his employee, who was terminated pursuant to a reduction in force, that

analysis, the comments contained in the memorandum were properly admitted.

II.

The Jury Instructions

A.

Westinghouse next challenges the correctness of the following jury instruction:

> In this area of the law, an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a pretext for illegal discrimination.

App. at 1235. Ryder first responds by asserting that Westinghouse failed to preserve, and therefore has waived, its objection to the jury instructions.

If a timely objection preserved the issue for appeal, we exercise plenary review to determine if the jury instructions, as a whole, stated the correct legal standard. Otherwise, we may exercise our discretion to reverse the judgment only for plain error contained in the instructions. *Seman v. Coplay Cement Co.*, 26 F.3d 428, 435 (3d Cir. 1994).

Federal Rule of Civil Procedure 51 provides, in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds for the objection.*

"they wanted a younger person" constituted inadmissible double hearsay. 850 F.2d at 1002. At the heart of our conclusion there was the fact that "they" were not identified anywhere in the record. Thus, we were unable to determine if "they" acted within the scope of their employment in making the statement at issue. *Id.*; *see also United States v. Cruz*, 910 F.2d 1072, 1081 n.10 (3d Cir. 1990).

Fed. R. Civ. P. 51 (emphasis added). We have interpreted this rule explicitly to require that any objections to the jury charge be made at the close of the charge. *Seman*, 26 F.3d at 436. It is clear from the record that while it objected to a separate portion of the court's instruction after the jury was charged, Westinghouse did not object to the sentence attacked on appeal. App. at 1244-45.[9]

We find inapplicable the exception to Rule 51 that no objection at the close of the charge is needed where the

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9. Rule 51 also requires that a party identify the objectionable matter "with sufficient clarity to give the trial judge notice of a possible error in the instruction." *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 993 (3d Cir.), *cert. denied sub nom., Jackson v. Chemical Leaman Tank Lines, Inc.*, 117 S. Ct. 485 (1996).

Our independent review of the record here shows that Westinghouse never objected specifically to the instruction challenged on appeal. At the charge conference, Westinghouse objected to the inferential proof instruction, which read:

> You may infer that Mr. Ryder has met his burden of proof if you find that the four facts set forth above have been proven by a preponderance of the evidence and if you further disbelieve defendant's explanation for why plaintiff's employment was terminated.

App. at 1234-35. On appeal, Westinghouse identifies as the erroneous instruction a sentence found in the paragraph immediately succeeding the instruction attacked at the charge conference:

> In this area of the law, an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a *pretext for illegal discrimination.*

App. at 1235 (emphasis added).

We conclude that Westinghouse's objection at the conference would not have alerted the district judge to the alleged error advanced on appeal. The former objection pertained to whether the inferential proof instruction would mislead the jury into believing that a finding of discrimination could be based solely on the *prima facie* case, in contravention of our holding in *Seman*, 26 F.3d at 435. Westinghouse contends that the instruction now challenged equated the disbelief of Westinghouse's reason with a finding that the reason was a pretext for discrimination, in contravention of the holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

district court expressly permits the parties "to incorporate by reference objections made during the charge conference." *Seman*, 26 F.3d at 436. Westinghouse argues that the district judge granted such express permission toward the end of the charge conference, in responding to Westinghouse's objection to the use of the word "performance" on page eight of the proposed instructions. The court stated that "[a]ll those are noted. . . . And they are preserved every time it is done." App. at 1224.

Our review of this colloquy in context, however, leads us to conclude that the judge was not granting the parties express permission to dispense with objections to the final, altered version of the jury instructions that were actually given to the jury. First, the reference to "performance" can be traced to an earlier Westinghouse objection, on pages six and seven, to the inclusion of "performance" in the instructions as "add[ing] an element to the case that really isn't in the case." App. at 1215. When Westinghouse objected to its inclusion again on page eight, the judge responded by noting that the issue was preserved. Second, Westinghouse's claim is belied by the district judge's invitation and acceptance of Westinghouse's objections after the charge was given. *Id.* at 1243-44.

Having concluded that Westinghouse did not preserve its objection to the jury instruction that it claims is erroneous, we will review the instruction only for plain error. *Chemical Leaman Tank Lines*, 89 F.3d at 993; *Seman*, 26 F.3d at 435. We will reverse and remand for a new trial only if the alleged error is fundamental and highly prejudicial, such that the instructions failed to provide the jury with adequate guidance and our refusal to consider the issue would result in a miscarriage of justice. *Brereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 53 (3d Cir. 1989).

B.

It is helpful to review briefly the evidentiary framework that applies in age discrimination cases based on a "pretext" theory. The plaintiff first must establish, by a preponderance of the evidence, a *prima facie* case of age discrimination by proving that he: (1) is over forty years of

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age; (2) is qualified for the position in question; (3) suffered an adverse employment action; and (4) was replaced by a sufficiently younger person to permit an inference of age discrimination. *Brewer v. Quaker State Refining Corp.*, 72 F.3d 326, 330 (3d Cir. 1995).

The defendant then must rebut this presumption by articulating a legitimate, nondiscriminatory reason for the adverse employment action. *Hicks*, 509 U.S. at 506-07 (1993); *Brewer*, 72 F.3d at 330. Finally, the plaintiff must satisfy his ultimate burden of proving, by a preponderance of the evidence, that the defendant's proffered reason is not the "true reason" for the decision, but instead is merely a pretext for age discrimination. *Hicks*, 509 U.S. at 511; *Bray v. Marriott Hotels*, 110 F.3d 986, 990 (3d Cir. 1997).

The plaintiff can meet this ultimate burden by proving, by circumstantial evidence, that the defendant's reason is "unworthy of credence." *Armbruster v. Unisys Corp*, 32 F.3d 768, 783 (3d Cir. 1994).[10] To establish such circumstantial proof, the plaintiff first must present evidence that each of the defendant's reasons is pretextual, viz, each reason was "a *post hoc* fabrication or otherwise did not actually motivate the employment action." *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). This proof of pretext then *may* be combined by the factfinder with the evidence used to support the plaintiff's *prima facie* case of age discrimination, and from this union, the factfinder *may* reasonably infer that the defendant discriminated against the plaintiff because of his age. *Hicks*, 509 U.S. at 511.[11]

Westinghouse contends that the district court instruction as to the final portion of the required proof was legally

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10. The plaintiff also may prove, by direct evidence, that a discriminatory reason more likely than not motivated the defendant, *Armbruster* 32 F.3d at 782-83, or that age played a role in and had a determinative effect on the outcome of the defendant's decisionmaking process. *Miller v. CIGNA Corp.*, 47 F.3d 586, 588 (3d Cir. 1995) (*en banc*).

11. Of course, such an inference is by no means *compelled* as a matter of law. *Hicks*, 509 U.S. at 511. We have stated that the factfinder in a pretext case "is not limited to a choice between finding that the alleged discriminatory motive or the employer's nondiscriminatory explanation was the sole cause of the employment action." *Miller*, 47 F.3d at 596.

erroneous. In its proper context, the pertinent portion of the instruction reads:

> You may infer that Mr. Ryder has met his burden of proof if you find that the four facts set forth above have been proven by a preponderance of the evidence and — note that I say "and" — if you further disbelieve defendant's explanation for why plaintiff's employment was terminated.
>
> . . . . If you find that Westinghouse articulated legitimate, nondiscriminatory reasons for eliminating plaintiffs [sic] job, then you must determine whether the plaintiff, John Ryder, has proven by a preponderance of evidence that the reason or explanation given by the defendant was not the real or true reason behind Westinghouse's action in terminating Mr. Ryder's employment.
>
> *In this area of the law, an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a pretext for illegal discrimination.* If you find that Mr. Ryder has proven by a preponderance of the evidence that the defendant, Westinghouse Electric Corporation, used the elimination of plaintiff's job as an excuse or pretext for discriminating against him on the basis of his age, then your verdict will be for Mr. Ryder, the plaintiff.
>
> On the other hand, if you find that the explanation offered by Westinghouse Electric Corporation . . . were [sic] legitimate reasons for plaintiff's termination, and that plaintiff has not proven by a preponderance of evidence that age was a determining factor in the termination of his employment, then your verdict will be for the defendant, Westinghouse Electric Corporation.
>
> In making this determination, you should be aware of the following: The burden of proving discrimination always remains with the plaintiff, John Ryder, to prove that he was a victim of age discrimination. . . . Your job is to determine whether Westinghouse discriminated against Mr. Ryder on the basis of his age.

App. at 1235-36 (emphasis added).

Westinghouse asserts that this highlighted sentence equated any disbelief of its proffered reasons with the finding that the reasons were necessarily pretexts for age discrimination. Westinghouse states that the jury should have been instructed that under *Hicks*, a jury may infer the ultimate fact of discrimination from its disbelief of the employer's reason and its belief of the evidence used to establish a *prima facie* case, but the jury is not required to do so.[12]

We agree that this statement was erroneous. We have stated that the factfinder in a pretext case is free to accept either or neither of the parties litigating positions as reflecting the whole truth. *Miller*, 47 F.3d at 597. That is why in *Miller*, we held that it was reversible error for the court to instruct the jury repeatedly that it had to find that age was the "sole cause" of the adverse employment action for the plaintiff to prevail on his ADEA claim. *Id.* In the case at bar, the jury may have believed that Westinghouse's reasons were pretextual, without necessarily believing that age discrimination was the real reason.

Despite this isolated error, we must read the jury instructions as a whole. *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 56 n.13 (3d Cir. 1989). Much like the case presented in *Lockhart*, we find this solitary misstatement of the law to be offset by the court's repeated correct explanation of Ryder's burden of proof.

For instance, in the sentence immediately following the erroneous sentence, the court clearly instructed that a verdict for Ryder was proper if the jury found that Westinghouse used the elimination of his job "as an excuse or pretext for discriminating against him on the basis of his age." App. at 1235.[13] Then, in the next paragraph, the court instructed the jury that if it believed Westinghouse's reasons and concluded that Ryder did not prove that "age

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12. We note that Westinghouse requested no such instruction in its proposed jury instructions.

13. This is nearly the exact language that Westinghouse requested the court to use. App. at 83-84.

was a determining factor in the termination of his employment," then its verdict would be for Westinghouse. *Id.* at 1235-36. Finally, the court again admonished the jury that "you should be aware of the following: The burden of proving discrimination always remains with [Ryder] to prove that he was the victim of age discrimination." *Id.* at 1236.

Based on our review of the instructions, we conclude that the multiplicity of correct statements negates the effect of the solitary erroneous utterance. Thus, we find that the court's instructions, as a whole, provided the jury with adequate guidance on the parties' respective evidentiary burdens, and we perceive of no miscarriage of justice that could have resulted.

Conclusion

For the foregoing reasons, we will affirm the order of the district court entering judgment for Ryder on the jury's verdict in his favor.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

From: 2300 Westinghouse Building
WIN: 272-5220
Date: September 1, 1994
Subject:

To: ALL PREVIOUS ATTENDEES OF CHAIRMAN'S INITIATIVE

We have now completed five Chairman's Initiative sessions.

Each one reinforces my belief in the need for change and provides some good ideas on how change can be achieved. The topics for this fifth session were: How to Achieve Our International Growth Objectives, How to Enhance our Strategic Direction and Implementation and Employee Selection, Development, Rewards and Costs.

The attached summaries of the discussions that took place on these topics are long, but valuable.

s/ Mike Jordan

Attachment

APPENDIX B

CHAIRMAN'S INITIATIVE - JULY 6-7, 1994

TOPIC: HOW TO ENHANCE OUR STRATEGIC DIRECTION AND IMPLEMENTATION

DISCUSSION:

Participant:

A part of our discussion had to do with whether Westinghouse has a strategic direction and some discussion on whether the strategic planning process needed to be improved within the businesses. A central question for us was whether we are a holding company or an integrated company.

Jordan:

Let me know when you figure it out.

Participant:

We think we're a hybrid and what happens frequently when you are a hybrid is that mixed signals are sent to the organization. Given the business climate we're in, and the organizational transition we have, the lack of a clearly articulated vision and strategic direction hampers the ability to motivate the stakeholders. While our primary focus was on employees this also includes shareholders and customers.

The last five years have been embarrassing. You hate to tell people that you work for Westinghouse. We have an identity crisis. People are not motivated today. We think there is a need for the employees to believe in something. In order to break the cycle of negativism we need to have a very positive vision. We need to know where we want to be as a corporation five to ten years from now. This vision clearly has to be linked to a global strategy and direction. For example, ABB has a slogan that is "think globally but act locally." That tends to unite how they go about doing their business. A vision of where we wanted to be globally would facilitate greater business unit cooperation. Another

example is Hewlett-Packard. Their equivalent of the Chairman's Advisory Council believes that you have to wear the HP hat in whatever country you're in. HP wants to create a sustainable corporate presence in target countries. We don't have similar guidelines. One of the people commented, "We buy airline tickets instead of having a presence". Our products are essentially U.S. oriented. Our turbines are 60 cycle instead of 50 cycle. Radars are another example.

This makes it difficult to sell these products in international markets. Today, we are an opportunistic, individualistic initiative-oriented company. A lack of presence in a country like India which has 15% of the world's population seems grossly shortsighted.

We discussed the fact that our failures are tied to a lack of understanding of the markets and a commitment to a long-term presence. This leads to impatience and a quick trigger in terms of pulling out.

Mike, earlier this year you articulated a strategic position for the Corporation that was an improvement on what we've had in the past. Historically, our strategy has been purely financial. You categorized our businesses in terms of whether we would grow them or maintain them. That's not enough. We also have some concern that there's slippage back into a strict financial view of our business portfolio. We also challenged some of the statements made on the overhead Gary used yesterday. One of the items that appeared was that we have "six strong core businesses." I guess we'd ask you what your definition of "strong" is.

Participant:

From a technology standpoint, we need to be better. I know in our business, technology is changing drastically. The current technology for the most part in radar, we're the best. But some of that technology is changing to a satellite base. For the most part I think we have good technical leadership but I believe we are lacking in some other key areas. We need to be more broad-based in our leadership to include a

greater variety of skills. My opinion is we need to be more coaches than managers. In terms of the work force, I think they're confused. For example, some of the people who work for me talked to me before I came here. They mentioned the letter that you wrote. They think, as I do, that your statement about blowing away the bureaucracy is absolutely right on the mark. Their question to me was, "When is this going to get to me? When am I going to see some of this happen at my level?" Our people are thirsty to blow away bureaucracy.

Jordan:

We have to be realistic. We've made a start. We have the big financial crisis behind us but we have an awful lot of work to do. Clearly, we have competitive issues and marketplace issues. We have to drive costs down across the board. Regarding the businesses we're in — until something better comes along, lets just run the hell out of those businesses.

Participant:

What does that mean? Does that mean to grow them? Does that mean to pull cash out of those businesses?

Jordan:

I think we have to spend time in each of the businesses defining that balance. We are in a position to and will fund growth initiatives. But we must also drive the last nickel out on performance. That's a difficult trade-off. What we're finding is the more you get people involved in solving business problems, the more you'll get costs out. For example, in the finance organization, when we benchmarked ourselves against other major corporations, we were at the bottom of the 4th quartile in every financial transaction. People were embarrassed, but this is just evidence that no one had ever challenged the system. For example, why do we have to have five travel expense signatures and audit every one? No one does that — no one. You don't "control your way to success".

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[sic] also wrestling with the strategic issues regarding whether we're going to play in certain markets or not. That process is by no means clear nor will it become clear within the next year or two. We will continually refine the dialogue. It's an iterative process. You keep going over it and over it and over it. You keep certain things. You throw out certain things. You set tighter performance standards. Obviously, we're living in a period of dynamic uncertainty. Nothing is going to be nailed down — ever. That's the nature of the world we live in. If you're going to grow and improve performance and dig your way out of financial problems. you're like the guy whose standing on the seal's back juggling six plates. That's essentially the way it's going to be. We'll try to make the best decisions as we move forward. You can't chisel anything in stone.

Where we are from a strategic standpoint is that we have six core businesses. These have greater or lesser degrees of strengths. Greater or lesser degrees of competitive position and market opportunity.

We have to maximize these trade-offs and it will be a dynamic activity so if the question is, "Are we going to grow?" The answer is, "Yes." If the question is, "Will there be pressure on the P&Ls?" The answer is, "Yes." Those things may be a little bit contradictory but you can never be satisified. For example, I'll never forget the look of absolute horror on Jim Watson's face when he saw the results of the purchasing study we did at Thermo King. They thought they had that thing buttoned down. There were certain areas they were managing very well. But there was a vast array of items between $50,000 and $500,000 where they weren't. So I think we have to realize that the pressure on operating performance does not mean that we're unwilling to invest — it just means we have to put the squeeze on everything and never be satisfied. By doing that, we can improve cash flow and generate many for acquisitions like Norden. I think that's hard for money people to grasp because they're not involved in the process. Our key is to get more people involved in the process of deciding how we can improve performance. When more people are involved

in the process, the less they feel that these things are imposed upon them. That's our challenge. We need to articulate what we're doing more clearly but we also have to get many more people involved.

What we need more help on is how do we get many people involved in driving the whole business performance forward. What I've seen is that we have good management but not good general management skills. We have tended to look at discrete slices of the businesses. We have to be taught how to make these trade-offs.

Participant:

Most manufacturing operations shifted in the '80s. Shifted from "push through" processes in the '80s to "pull through" in the '90s. We are not very customer focused. Westinghouse has historically been a weak marketing organization [sic] that doesn't mean sales, it means marketing. This results in a business planning or strategic planning process that is a little bit in chaos.

A few years ago we had a process where the Chairman would visit each business unit once every two years for a couple of hours to discuss the business. You've wanted to be more involved so we're doing that. But, in the interim, we had a business planning process that looked like it was going to provide an integrated business performance and strategic thinking system. We had hoped we could institutionalize that within the business unit along predicable cycles but since you and Rick and Fred have come in, you tend to approach things in a different way and use a different language.

We need to develop a common language and a common framework for strategic thinking that allows the Executive Office to be involved. We think you have the capacity to stand back from these businesses and look at them in a more objective way. You can also help us to think more globally. We also think that we must focus on combining the capabilities of various Westinghouse organizations to create new market opportunities.

We think we need to get younger individuals who think well and who think differently involved in the process as well. Strategic thinking has to be a line [sic] management job; not a job you delegate to someone. Having an established strategic direction and vision for Westinghouse is essential. Many of our other issues as a group are related to this.

Participant:

I think a high percentage of people are in the bleachers waiting for the game to begin. They're waiting for something to happen and don't realize that they're the ones who have to make it happen.

Clark:

How would you describe the current strategic process?

Participant:

The way I see it we've been trying to explain our business to the Executive Office and gotten a little bit frustrated because we've explained it multiple times, but it doesn't appear that we're speaking the same language yet. We recognize that that's a major fault of ours because we understand our business and we have to be able to explain it to our chief stakeholders — the Executive Office. We recognize we have a long way to go. As you flatten the hierarchy in a large organization and empower people, you have to be more disciplined in establishing the common language. We need to establish a common frame of reference and a common understanding so that

when people act they act appropriately — they're not confused and they don't make mistakes.

Participant:

It's hard to relate strategic direction when we don't have and don't share common frameworks.

Jordan:

Because we have new people with different perspectives as well as changing circumstances we've had to have shorter feedback loops on the business planning cycle. I think we need a concrete set of expectations, priorities and actions. We need to do it in a more comprehensive way than we've ever done it in the past because we're talking about trade-offs.

Participant:

I believe one of the difficulties is an inherent skepticism on the part of management to CEO involvement because of what we went through. Many of them don't see the positive aspects of it yet. That's why you need to share your vision regarding where we're going.

Participant:

I think that one of the things that we take for granted is the true power of our company name. Frequently, we are in places because of yesterday's power. People everywhere know our name but they don't necessarily know who we are. Most people still believe that we make refrigerators.

Our core competencies are large projects, systems engineering, systems analysis on a broad scale, setting up large projects, (nuclear power plants, power generation, power plants, air traffic control systems). We're pretty good at integrating various hardware components where software is the key that links it all together. Our people need to be taught how to manage those projects and once they become proficient they can go on from there into broader general management assignments. So, large

project management is our strength and we should bid more jobs like that. The product sometimes becomes a commodity but that large system's integration capability is where we have our strength.

Participant:

One of our difficulties is that products we have don't match up well with our customers expectation internationally. Is it that we don't take time to find out what non-U.S. customers need, or we just don't think that way.

Participant:

As a strong engineering technology company, we think we have the answer. The customer just doesn't understand. We're dominated by technical people not marketing people.

Participant:

You know Mike, you're [sic] strategy description that grouped Westinghouse into three groups of businesses was the first time a CEO has put a stake in the ground for a long time. Both you and Gary have mentioned the fact that you have gone after industry segments in addition to geographic regions and we think that's important. We haven't had an executive office in the last ten years that has been willing to take on that role. That's part of being customer focused but I think that has to be advertised more. People need to know what the Executive Office is doing. Other than a few of us who get the E-Mails that come in, I don't think the majority of the organization knows what you've been doing. The fact that you went golfing with two of our key customers at ESBU and PGBU is great but I think it's accidental if anybody knows you're out there trying to develop relationships with our customers.

Jordan:

That's interesting because from my background you did these things just as matter of course. But I'd like to come

back for a minute to recognizing the realities of the market and our position in it. Are we really good at seeing the works?

Participant:

No, because we don't segment the market the way we need to segment it in order to see the works.

Participant:

Right, and it becomes hard for you to challenge the assertions because the facts aren't there.

Jordan:

I think a big part of this is confusion of language when we get together for the business planning dialogue. I'm coming at it from a very different perspective and we're not intersecting. I think we have to find a way to close the communication.

Participant:

We've been told that there's going to be a business thinking or strategic thinking seminiar. That [sic] I endorse the hell out of that because it would help us to narrow the gap. All of us want to enhance and improve. One of the most frustrating things we've been through is to have the boss come in and you want to tell him all the great things your [sic] doing and they're coming at it from a totally different perspective.

Participant:

This is something we really need to change.

Jordan:

I think this is a useful insight because I think you've defined the status quo direction and the reason for the direction as well as some add-ons, pluses and minuses but my question is, "why"? Why is that the status quo direction? There's been no logic process that would lead you to that course of action. For example, if we want to sell

radar systems and air traffic control systems in places all over the world, they're going to have to be a lot simpler than the ones we make. There's a marketplace logic and a fit that we don't really discuss. Those are really the first principals of the discussions.

Participant:

While the third group is going to touch on this, our group firmly believes that Westinghouse employees want to be proud of Westinghouse. One of our other guys talked about the fact that your words sink down about one or two layers and that's it. We have to get the word out to the whole organization. We think a vision can motivate a large number of people a lot easier than numbers can. We think those numbers follow a strategic direction.

Jordan:

What people really want to hear and identify with is a description of the businesses that we need to be in and can be successful in but I don't think we need to be prescriptive in terms of what people need to do to be successful in those businesses. People need to know that we are willing to invest in these businesses. They need to know there is a light at the end of the tunnel. People might need to know that the company can be successful. It can be a winner.

There are many opportunities for improvement. Every time we go after a major change activity and get the people involved, we find that it works. People get excited about it. It's a big job but people need to know that management is behind them; that their [sic] not out there laboring alone.

Participant:

Your history has been that when a business got in trouble you got rid of it. It was "buy high, sell low." What you've said, Mike, is that "we're committed; we're going to fix this." We all know there are some tough things we have to do to accomplish that.

Participant:

I have a question Mike. Our markets are going off on a lot of different directions. I guess one of things we were questioning is whether Westinghouse should be going off in some very different directions with one or two of our businesses.

Jordan:

Yes, I think we need to take a look at that but, unfortunately, that has taken a back seat to the overall financial issues as well as refining the goals and strategies at the business unit level. Hopefully, after this year is over we can start thinking a lot more creatively. But realistically, the bulk of our improvement in the next two years is going to be cost reduction.

Participant:

Employees see the stability we've achieved. But I believe our people want to see a strategic vision for Westinghouse. They would like to believe that we're something more than a holding company.

Participant:

That's right. Our employees would like to believe that the whole of Westinghouse is greater than the sum of its parts. The name Westinghouse is such a powerful name around the world. You can get into almost anywhere on the strength of the name. I think we under value that. I think we should strive more to look for opportunities to do large project and systems integration work.

Jordan:

We have a collection of businesses that have some relationship with one another. Some are weaker, some are stronger. That's the hand we've been dealt. I've always believed that you're much better off taking the business you're in and maximizing performance in that business. You want to maximize your future and look for growth opportunities in those businesses. You look for extensions

and relationships beyond that. It's often a mistake to buy into a growth market. One, it's awfully expensive and, two, you don't bring much to the party. It's hard to figure out how to articulate that. We're not a holding company but we're a holding company with a relatively intent management style. We're not going to manage the business by the numbers. We're going to manage it by being competitive and maximizing our operating performance. In my mind that's the role that we (Executive Office) have to play. We have to be convinced that we're doing that. We have to be operating at a higher level of strategic thought and performance. We have to manage the financial resources and the people resources in order to make that happen.

Participant:

Regarding our global business strategy, you know our businesses are tied to infrastructures for the most part. These are large, well-developed economies whose companies and markets have their own indigenous capabilities that are very well protected. And these are countries totally without resources. We're not after either of those countries, but we're somewhere in between. We're after working with those economies and those countries that are trying to build their economy and develop their infrastructure. In those cases, we believe that we are a corporation which has synergies that we can bring to bear in those countries. We believe that decisions that are being made in these countries are being made regarding how to invest in developing electric power, how to develop a defense capability, how to pursue telecommunications capability.

Jordan:

You're right. The places where we're going to make the greatest advances are in those emerging economies. Financing issues, political issues, relationship issues, all have to be dealt with.

Participant:

That's why we have to get ourselves coordinated. People in these countries don't want four or five people from the same company coming in selling them different products. They want a coordinated effort presented to them by one lead person.

CHAIRMAN'S INITIATIVE - JULY 6-7, 1994

TOPIC: EMPLOYEE SELECTION DEVELOPMENT REWARDS AND COSTS

DISCUSSION:

Participant:

Our group selected employees. How we develop them, how we reward them, how we incentivize them and how we manage those costs.

We discussed a number of things such as acting like a small company, movement of people between business units and incentives. Much of our discussion focused on the question of which are corporate activities and which belong to the business units. We decided that both the business units and the corporation must do all. You can't separate the two.

We discussed the Leadership Development Process (LDP). We believe that it's a good start but it's superficial because it can only go down so far. We believe that both performance appraisals and the 360 evaluation process should be used down in the organization. We also think that it should be used for both development and if possible evaluation.

Jordan:

Regarding the 360 evaluation process, it seems to me that any dialogue that the boss has with one of his subordinates after getting the 360 evaluation is good. If the boss has his antenna up he will get a lot out of that discussion.

Participant:

We've been doing this inside ESBU for a while. I think you have to be careful in using the 360 for evaluation purposes. In it we're asking the employee to be frank and honest and expose their areas, certain areas for development. If we then use it for evaluation purposes, perhaps the honesty won't be there.

Participant:

The 360 instrument builds on strength. It's good for assessment. However, we need help because we may have the right players but they could be in the wrong chairs.

Participant:

In many of our businesses we have an older workforce. As a result, that workforce gets a higher salary. Additionally, our low growth businesses can strain opportunities for younger workers. Somehow we must provide those opportunities. We have to get the "blockers" out of the way.

Participant:

We're often in the position to having to let younger people go because of the guidelines we're forced to used. However, often they are the ones who have the skills we need.

Participant:

We believe that training budgets should be spent for training. Don't cut them at the first sign of pressure. Additionally, programs should be designed for the specific needs of individuals.

Participant:

Yes, the question should be to the business unit leaders. Did you invest your training and development money wisely?

Jordan:

Do you have any sense of what is most and least successful in the area of training for management development?

Participant:

Some course work is not productive. Seminars and conferences that are technology related can help. Job rotation is probably best.

Participant:

We had some diversity training which was very good because it helped us to change our thinking. It wasn't like we went back to business as usual. I was able to see how people changed the way they looked at things.

Participant:

Training for general management tends to be financial. Management development approaches are important too.

Participant:

We discussed the possibility of using long-term incentives to get management to move on development issues.

Participant:

We talked about how important it would be to look at how many people come out of a person's business. It adversely impacts short-term results when we give up our good people but it is the right thing to do.

Jordan:

Strategic areas of the non-financial nature are now being included in incentive calculations.

Participant:

We discussed the cost of employee development and we're looking for some creative ways to accomplish it. We thought that maybe we could exchange employees between business units or business unit sites. Even short-term visits might be helpful.

Participant:

Our business unit exchanges young EMPDPs (Engineering Manufacturing Professional Development Program) for a year and that's working very well for us.

Participant:

We think a lot could be accomplished by the Councils in the area of development. Perhaps we should give them people development responsibility and push them to management rotation.

Participant:

When you have a risky business venture, some senior managers may not want to touch it because it is so risky. Potentially, people down in the organization could take it on. But, I guess the question is how much tolerance do we have for failure here. Do you tell a person, "Hey, don't worry about it if it doesn't work, we won't hold it against you"? Perhaps they would behave differently if we give them that message.

Jordan:

First, you have to understand the nature of the risk. Sure, circumstances change. You have to determine if the person is doing the right things. You must have an insight into that situation to determine if the person was doing the right things or whether they were playing it safe. From the developmental standpoint, these types of experiences force you to rethink the entire business system, the environment, what are we trying to accomplish ... you get people to break out of the mold. Anytime you force people to think, and they demonstrate a capability to do that, you have a great developmental experience. But some senior person has to keep a lifeline into that project so that if it fails, the person understands why it fails. If you do things by the numbers, people are always going to take the safe route. But if you manage the business with penetration and insight, than [sic] you can overcome it. If it's just the numbers, the young managers never learn. Senior managers have to keep track of that and be sure that people learn.

Participant:

We also discussed acquisitions and we were concerned about how to do those acquisitions without applying Westinghouse restrictions and constraining them. How do we take advantage of their small company approach to things within the context of a big Westinghouse.

Jordan:

What you find is that a lot of people can't make the jump from a five million dollar business to a ten million dollar business. The danger is when you take the position "Well, we'll just leave these guys alone." In any new venture like that, you have to put one or two quality people in there to interpret the big company to the little company.

Participant:

We discussed employee selection and development. We agreed that moving someone is a major developmental activity.

Participant:

We're pretty good at getting good people.

Jordan:

The next 18 months are going to be pretty intense in looking at reductions.

Participant:

Westinghouse has been pretty paternalistic in the past and we've ended up with too much dead wood in the organization.

Jordan:

Yes, and that's a big issue because as you squeeze the infrastructure, you want your best talent to stay in the organization.

Participant:

As Westinghouse moves to a flatter organization structure, we may have to have different kinds of incentives.

Participant:

We had a discussion regarding how to grade jobs. In the past we've put an awful lot [sic] emphasis on the number of people an individual manages. We have to look at

changing that to avoid building empires and grade jobs according to knowledge, experience and the ability to make a contribution.

Participant:

We really haven't hired much over the last 10-15 years. As a result, we have a hole in terms of people development. We don't have enough people in the organization ages 30-40. Somehow we have to anticipate what our requirements are for people three years down the road and be willing to hire people for the future.

Jordan:

That's the issue at many business units. You have to have regeneration.

Participant:

We spent some time talking about the dynamic staffing process we used in Human Resources and in ESBU. It's different than from what we've done in the past. Typically, we do a percentage reduction. This new approach is really reengineering. It's painful as hell, but it's caused us to look at the fundamentals of our business. It's provided real benefits without putting us in a position of too much exposure. We seem to have gotten buy-in from people. Also it allows us to get the blockers out of the way.

Participant:

Blockers are always an issue but they're less of an issue when you are in a growth mode. Removing blockers is very important when you're in a downsizing mode because you don't have the kinds of opportunities that growth provides you.

Jordan:

People down in the organization know who they are. As we roll out this Leadership Development Process (LDP) over the next year, we have to put ourselves in a position of getting high pots into more responsible jobs and move

the blockers aside. That's hard to do, and no one likes to do it but we're paying the price now for our inability to do it in the past.

Clark:

I think compression has exacerbated this issue. For example, in what was our Distribution and Control Business Unit, we took that from four business units and 17 divisions to one business unit with four divisions. The downsizing at ESG and ESBU has compounded our problem.

Jordan:

I have a perspective on that. In a different culture, in Pepsi we had to review organizations every year. Over a period of three years, with an organization that had 10,000 sales people, 28 out of 35 second level managers changed. When you have a concept of what you want the job to be you must hold yourself to it. What we need to do as the leadership of this organization, is force ourselves to those standards so that the best persons get into the right positions. An eager high-energy person will get more done in one month than someone who has retired in place will do in one year.

Participant:

In our culture. we're very queasy about letting people go.

Participant:

Of the 28 managers who were changed, how many stayed with Pepsi?

Jordan:

Seven or eight. Some of those individuals were downgraded to lower level positions but if you see a person can't perform even at lower levels, you must let them go. That's very difficult to do in a paternalistic culture. However, in the final analysis we pay a big price for not doing it. The synergism in the people lower down in the organization is very high. If you want to know who the blockers are in the organization ask them. We just have to go after that. The frustration at lower levels in the organization comes from layers of bureaucracies but it also comes from having "mediocrity in depth".

Participant:

In the past we had what we called "The Imperial Chairman". The people who got rewarded were the "friends in the old boys system".

Jordan:

Right, that's called cronyism.

Participant:

One of the things that exacerbates that is that our customers have the same bureaucratic culture. They're status conscious. When they have a problem their expectations [sic] is that we have the appropriate level of management to respond.

Clark:

That's one of the reasons why we made our business unit guys Presidents. It seems like every time you talk with potential customer or customers they tell you we want the "President".

Jordan:

Getting back to the main focus. We're trying to initiate a process (LDP) to get at these issues of organization develop [sic] and people. We're just introducing the idea this time around and in subsequent sessions we're [sic] try to penetrate further into the organizations. Essentially, we're trying to communicate an idea. It's up to you guys to push these ideas down in the organization. Every group we talk with here brings up the same issues because every one recognizes the problem. I encourage you to really push that from your side.

Clearly, we want the highest calibre organization we can get. In some cases, that means replacing managers who don't have the skills or potential of some of the people down below. In some cases it means going outside for talented people. We have a problem in that Westinghouse has stagnated over time. As we increase the pressure and push on making the organization smaller, that must be a positive pressure, not a negative one as we have in the past. That's the message: we have to do every thing we can to utilize the talents of people down in the organization.

One of the exercises we did at one of the business units was to determine where the four or five change activities are that go beyond day-to-day management, than [sic] we asked, "Who are the candidates in the organization who can take on those roles". Unfortunately, the same four or five names kept coming up. We seem to be missing the people in the middle of the age range who have talent, the willingness and the horsepower to take on risky change projects. We don't have those types pushing up from the bottom. We have a kind of regeneration gap here. We have to have those kinds of people. Not only are these individuals the leadership of tomorrow, these are the people that create ferment down in the ranks that pushes against the status quo in the system.

CLOSING COMMENTS

Jordan:

Just two. First, like the ideas that came out today. Some good clarifications for us of past issues and some new issues. It's good food for thought for us. On the flip side, I hope the same goes for all of you. In the last few of these sessions, I had the sense that we are on the same page. We have a lot of talent in this organization. We just have to break free of some of our past practices.

Clark:

We certainly appreciate your participation and your input. This whole issue of global strategy is something that we're spending time on and we're focusing on. Mike has a lot of experience in this area as well as a lot of interest. We've had a China summit: we are soon going to have a Russia summit. We do need to leverage our corporate strengths abroad. This issue of corporate direction and strategy is something I have a lot of interest in but I'll tell you, it's a tough issue. Regarding the issue of blockages in the organization, that's something that you need to work on in the business units. Its difficult for us to do that from Gateway. We are going to push to change the old rules and the old paradigms. This was a good session with a lot of good ideas and I hope you feel the same way.

Supreme Court, U.S.
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No. 97-1070

In The

Supreme Court of the United States

October Term, 1997

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

JOHN M. RYDER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Question 1.

Whether a district court abuses its discretion under F.R.E. 403 by admitting evidence of allegedly ageist statements made by an employer's CEO and executives with hiring and firing authority to circumstantially show the corporate culture where employment decisions are made in an indirect evidence action under the Age Discrimination in Employment Act?

Question 2.

Where a party does not object to a trial judge's jury instructions, and where the jury instructions as a whole state the correct legal standard, must the trial judge *sua sponte* issue a curative instruction to correct a solitary erroneous utterance during the charge?

LIST OF PARTIES

Respondent concurs with Petitioner's List of the Parties.

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION 1

SUPPLEMENTAL STATUTES INVOLVED 1

COUNTER STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 13

I. No actual conflict exists on the admissibility under Rule 403 of "Stray Remarks" Evidence in an ADEA Pretext Case 13

II. Petitioner did not even object to the jury instruction it claims was error 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Abrams v. Lightolier, Inc., 50 F.3d 1204 (3d Cir. 1995) 22

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996) 20

Antol v. Perry, 82 F.3d 1291 (3d Cir. 1996) 15, 21

Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86 (1st Cir. 1996) 15

Blossom v. CSX Transp., Inc., 13 F.3d 1477 (11th Cir. 1994) 28

Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326 (3d Cir. 1995) 21

Brown v. Boston University, 891 F.2d 337 (1st Cir. 1989) 24

Campbell v. Barlett, 975 F.2d 1569 (10th Cir. 1992) 29

City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 26

City of Springfield, Mass. v. Kibbe, 480 U.S. 257 (1987) 25

Conway v. Electro Switch Corp., 825 F.2d 593 (1st Cir. 1987) 15, 24

Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325 (6th Cir. 1994) 15, 18

Dupre v. Fru-Con Engineering, Inc., 112 F.3d 329 (8th Cir. 1997) 29

Elgabri v. Lekas, 964 F.2d 1255 (1st Cir. 1992) 29

TABLE OF AUTHORITIES – Continued

Page

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988) 22

Ezold v. Wold, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1993)..... 15

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 14

General Elec. Co. et al. v. Joiner, ___ U.S. ___, 1997 U.S. LEXIS 7503 (December 15, 1997) 17

Glass v. Philadelphia Elec. Co., 34 F.3d 188 (3d Cir. 1994)..... 22

Glover v. Bic Corp., 987 F.2d 1410 (9th Cir. 1993)..... 29

Graham v. Davis, 880 F.2d 1414 (D.C. Cir. 1989)..... 29

Hafner v. Brown, 983 F.2d 570 (4th Cir. 1992) 29

Haley v. Gross, 86 F.3d 630 (7th Cir. 1996) 29

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) ...21, 23

Houston v. Herring, 562 F.2d 347 (5th Cir. 1977)..... 28

Huff v. UARCO, Inc., 122 F.3d 374 (7th Cir. 1997) 14

Jamesbury Corp. v. Litton Industrial Products, Inc., 756 F.2d 1556 (Fed. Cir. 1985)..... 28

Kelly v. Boeing Petroleum Services, Inc., 61 F.3d 350 (5th Cir. 1995)..... 29

Lockhart v. Westinghouse Credit Corp., 879 F.2d 43 (3d Cir. 1989) 22, 24

Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955)..... 26

TABLE OF AUTHORITIES – Continued

Page

McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) 8, 13, 14, 19, 27

McNeil v. Economics Laboratory, Inc., 800 F.2d 111 (7th Cir. 1986) 20

Modine Mfg. Co. v. Allen Group, Inc., 917 F.2d 538 (Fed. Cir. 1990) 29

Moreau v. Pennsylvania R.R. Co., 166 F.2d 543 (3d Cir. 1948) 28

O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 878 (1996) 16

Old Chief v. United States, 519 U.S. ___, 117 S. Ct. 644 (1997) 17, 20

Ostrowski v. Atlantic Mutual Insurance Co., 968 F.2d 171 (2d Cir. 1992) 15

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 13, 19

Preferred RX, Inc. v. American Prescription Plan, Inc., 46 F.3d 535 (6th Cir. 1995) 29

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 14

Riordan v. Kempiners, 831 F.2d 690 (7th Cir. 1987) 20

Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997) 27

Roebuck v. Drexel University, 852 F.2d 715 (3d Cir. 1988) 15

Ryder v. Westinghouse Electric Corp., 128 F.3d 128 (3d Cir. 1997) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Seltzer v. Chesley, 512 F.2d 1030 (9th Cir. 1975) 28

Seman v. Coplay Cement Co., 26 F.3d 428 (3d Cir. 1994) 10

Sessoms v. Union Sav. & Trust Co., 338 F.2d 752 (6th Cir. 1964) 28

Sims v. Mulcahy, 902 F.2d 524 (7th Cir. 1990) 17

Smalley v. Duluth, Winnipeg & Pacific Ry. Co., 940 F.2d 296 (8th Cir. 1991) 28

Spartaburg County Sch. Dist. v. Nat'l Gypsum Co., 805 F.2d 1148 (4th Cir. 1986) 28

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 13, 14, 27

Thornley v. Penton Publishing, Inc., 104 F.3d 26 (2d Cir. 1997) 28

Travelers Indemnity Co. v. Scor Reinsurance Co., 62 F.3d 74 (2d Cir. 1995) 29

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983) 13, 22

United States v. Long, 574 F.2d 761 (3d Cir. 1978), *cert. denied*, 439 U.S. 985 (1978) 17, 18

Waldron v. SL Industries, Inc., 56 F.3d 491 (3d Cir. 1995) 22, 23

Wammock v. Celotex Corp., 835 F.2d 818 (11th Cir. 1988) 29

TABLE OF AUTHORITIES – Continued

Page

West v. Philadelphia Elect. Corp., 45 F.3d 744 (3d Cir. 1995) 24

Wilde v. Florida Pneumatic Mft. Corp., 941 F. Supp. 1203 (S.D. Fla. 1996) 16

STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 2101(c) 1

Fed. R. Civ. P. 50 ..... 27, 30

Fed. R. Civ. P. 51 ..... 1, 12, 25, 26, 29

Fed. R. Evid. 401 17

Fed. R. Evid. 403 ..... 11, 16, 17, 18, 25

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, John M. Ryder, (hereafter "Ryder") respectfully requests this Court deny the petition for writ of certiorari, seeking review of the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case. That opinion is reported at 128 F.3d 128 (3d Cir. 1997).

JURISDICTION

Respondent agrees that Westinghouse's Petition for Writ of Certiorari was sought within 90 days of the judgment of the Court of Appeals and therefore is timely pursuant to 28 U.S.C. § 1257 and § 2101(c), and this Court's Rule 10(1)(c).

SUPPLEMENTAL STATUTES INVOLVED

In addition to the statutes cited by Petitioner, the following Rules are involved in the determination of the Petition:

Fed.R.Civ.P. 51.

Instructions to Jury: Objection

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly

the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

COUNTER STATEMENT OF THE CASE

A. Westinghouse Fires Ryder and Then Fabricates a Reason.

On April 6, 1993, Louis Facchini, controller of Westinghouse's power systems group in Pittsburgh, Pennsylvania, fired Ryder at age 52 after more than 30 years of service (R. 161);[1] (R. 192).[2] On the day he fired him, Facchini told Ryder: "I am eliminating your job, but, of course, I am not" (R. 192). That is exactly what occurred.

Shortly after Facchini "retired" Ryder and "eliminated" his job, he offered Ryder's position as Power Systems Group Controller Staff Assistant to Patricia Newingham, a 37-year-old who came under Facchini's supervision in February 1993, after her department was discontinued (R. 186-87). Ryder had trained Newingham to perform his job, and Newingham had been performing Ryder's job and continued to do so after Ryder was discharged (R. 405). Facchini protected Newingham from displacement when her department was discontinued by keeping her on a corporate payroll, although she worked solely for him (R. 363).

Indeed, in a document Westinghouse titled "Certificate of Non-Discrimination – Age," which Westinghouse used to document its decision to fire Ryder, Facchini identified Newingham as Ryder's replacement (R.

---

[1] References to the record are noted as "(R. ___)."

[2] Facchini characterized his action as "retir[ing]" John Ryder (R. 383).

404-406). Facchini and his supervisor, Robert Faust, Vice President and Controller of Westinghouse, completed the "Certificate" on April 15, 1993, less than two weeks after Facchini told Ryder his position was being eliminated (R. 192); (R. 402); (R. 928-929).

Although Facchini believed Ryder was more qualified technically to perform the job than Newingham (R. 416), he replaced Ryder with Newingham because he was looking for someone more ambitious, flexible and hungry (R. 416).

Facchini characterized Ryder as a "blocker," (R. 484-485), someone who is preventing someone younger from getting through to another executive level (R. 482).

On the "Certificate of Non-Age Discrimination," Facchini and Faust admitted their action was not based in *any* degree upon Ryder's performance (R. 930); (R. 410). Indeed, on a March 1993 performance evaluation completed seven to ten days before Ryder was fired for what Faust and Facchini at trial claimed was poor performance, Facchini noted Ryder was "promotable" (R. 27-28); (R. 387-388).

However, when Ryder filed a charge of discrimination with the Equal Employment Opportunity Commission, and at trial, Westinghouse began to claim it did not "replace" Ryder with Newingham, *see* (R. 15) and that he was discharged because of "cost reduction and performance" (R. 928); *see also* (Petition at 2-3).

In its response to the Charge of Discrimination filed with the EEOC, Westinghouse claimed that when Ryder's job was eliminated a new and different training position arose (R. 350); (R. 15).

The only difference between the job description Westinghouse provided as being the "new training position"

and Ryder's position, however, was that Ryder's job description identified the job as being for the Power Systems Division, while the "new training position" Newingham obtained was listed as being in the Corporate Financial Planning Division (R. 329-330).

Facchini admitted at the beginning of 1993 he had two staff persons assisting him in his job: his secretary, and his staff assistant, Ryder (R. 358-359). Following his discharge of Ryder, Facchini still had two staff persons assisting him in his job: his secretary and Patricia Newingham (R. 360). He always had a staff assistant (R. 361).

According to Facchini, the decision to create a new training position occurred in April 1993 (R. 365). Facchini said he then considered several employees for the new position, talked with Newingham about the position and told her it was a temporary training job (R. 474). According to Westinghouse's letter to the EEOC, Newingham started in the "new" position effective June 1, 1993 (R. 15).

Newingham, however, apparently was oblivious to this series of events. She testified she began working for Facchini in January or February 1993 (R. 497), shortly after the group for which she worked was eliminated, and the divisions reporting to it were transferred to Facchini's group (R. 498):

> Q. You don't ever recall sitting down and having a meeting with Mr. Facchini where he told you, I've created a new job, a new training position, and I am giving you that job, do you?
>
> A. No.

(R. 510). *Compare* (R. 474).

Facchini testified he considered only three persons to fill this "new" training position: Newingham, then age 37

(R. 398); Jim Kohosek, then age 34 (R. 401); and Mike Friday, then age 35 (R. 401). All three of those people were still with Westinghouse as of trial (R. 475).

While six days after Ryder was "retired," Facchini and Faust insisted performance played no role in his demise, (R. 409); (R. 930), once trial began "performance was the main thing," according to Facchini (R. 825).

These difficulties, according to Westinghouse, ran the gamut from poor interpersonal skills, to an alcohol problem. Most of these performance concerns were not documented, and not relayed to Ryder when he was "retired," a fact Westinghouse now claims stemmed from its desire not to harm Ryder. *See* (R. 332-333). None of them were raised when the EEOC requested the reason Ryder was discharged. *See* (R. 14-17).

B. Westinghouse's CEO Publishes A Summary Of Various Age-Related Comments From General Managers Who Made Hiring And Firing Decisions.

Shortly before Ryder was "retired" on August 31, 1993, a new Chief Executive Officer and Chairman of the Board, Michael Jordan, arrived at Westinghouse (R. 420); (R. 637). At the time Ryder was told he was being terminated, Gary Clark was President and Acting CEO (R. 633-35). Clark had been president of Westinghouse prior to 1993 (R. 472).

During the summer of 1994, Clark and Jordan conducted a series of meetings with Westinghouse management at the general manager level (R. 426). Among the persons who attended some of these meetings, called Chairman's Initiative Sessions, were *Facchini*, Ryder's

direct supervisor (R. 423); and *Faust*, Facchini's supervisor (R. 452-453). The people who attended these Chairman Initiative sessions were general managers who made hiring and firing decisions and who set policy regarding hiring and firing practices in their own departments (R. 426-427). At trial Westinghouse claimed it destroyed files listing the actual names of the persons who attended (R. 451).

Following the five sessions, Jordan sent to all attendees a document he represented to be summaries of discussions that took place (A-19).[3] The summaries were a synopsis, not a verbatim transcript of the discussions (R. 648). In his Memo, Jordan said the accompanying summaries while long, were valuable (A-19), and that the discussions outlined provided some good ideas. *Id.*

The summary Jordan sent to managers with his endorsement of its contents suggested that the age of the workforce was of some importance to Westinghouse:

> We think we need to get *younger individuals* who think well and who think differently involved in the process as well . . .

(A-15) (emphasis added).

In the excerpts Jordan chose to publish of another session devoted to employee selection, Jordan, Clark and the other managers discuss the concerns with Westinghouse's older workforce:

> In many of our businesses, we have an *older workforce*. As a result, that workforce gets a higher salary. Additionally our low growth businesses can *strain opportunities for younger workers*. Somehow, we must provide those

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[3] References to the Appendix to Westinghouse's Petition For Writ of Certiorari are designated as (A-___).

opportunities. We have to get the "blockers" out of the way.

(A-34).

Westinghouse has been pretty paternalistic in the past, and we've ended up with too much dead wood in the organization.

(A-37).

Yes, and that's a big issue because as you squeeze the infrastructure, you want your best talent to stay in the organization.

(A-37).

We really haven't hired much over the last 10-15 years. As a result, we have a hole in terms of people development. *We don't have enough people in the organization ages 30-40 . . .*

(A-38).

Blockers are always an issue but they're less of an issue when you are in a growth mode. Removing blockers is very important when you're in a downsizing mode because you don't have the kinds of opportunities that growth provides you.

(A-38).

People down in the organization know who they are . . . [W]e have to put ourselves in a position of getting high pots into more responsible jobs and move the blockers aside. That's hard to do, and no one likes to do it, but we're paying the price now for our inability to do it in the past.

(A-38-39).

. . . [A]n eager high-energy person will get more done in one month than someone who has retired in place will do in one year.

(A-39).

> We seem to be missing the people in the middle of the age range who have talent, the willingness and the horsepower to take on risky change projects . . .

(A-41).

> Regarding the issue of blockages in the organization that's something you need to work on in the business units . . . We are going to push to change the old rules and the old paradigms. This was a good session with a lot of good ideas and I hope you feel the same way.

(A-42).

Facchini saw Ryder as a "blocker," (R. 484-485), a term he agreed was someone who is preventing someone younger from getting through to another executive level (R. 482).

Clark, Westinghouse's president when Ryder was "retired," believes some of the statements made in the Jordan Memo evidence discrimination (R. 672-674).

C. Westinghouse Never Objected to The Claimed Jury Charge Error it Raises Here.

Prior to trial, Westinghouse submitted proposed jury instructions requesting the jury be charged on the standard under *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), in relevant part as follows:

> If you determine that the Plaintiff has made out a *prima facie* case and if you determine that Westinghouse has articulated or explained – not proven – a legitimate reason for eliminating Plaintiff's job, then you may consider if the Plaintiff has proven to you by a preponderance of the evidence that the legitimate non-discriminatory reasons stated to you by Westinghouse were simply a pretext for discrimination

> against Plaintiff on the basis of age. That is, you may then consider whether Plaintiff has proven by a preponderance of the evidence . . . that the explanation offered by Westinghouse for the treatment of Plaintiff was not the real reason behind its treatment of him.
>
> If you find that Plaintiff has established . . . that Westinghouse merely used the elimination of Plaintiff's job as an excuse for discriminating against the Plaintiff on the basis of his age, then you *must find in favor* of Plaintiff.

(R. 84) (emphasis supplied).

The district court charged on this issue as follows:

> You may infer that Mr. Ryder has met his burden of proof if you find the four facts set forth above have been proven by a preponderance of evidence, and – and note that I say "and" – if you further disbelieve defendant's explanation for why plaintiff's employment was terminated.
>
> . . . If you find that Westinghouse articulated legitimate nondiscriminatory reasons for eliminating plaintiff's job, then you must determine whether plaintiff has proven . . . that the reason or explanation given by the defendant was not the real or true reason behind Westinghouse's action in terminating Ryder's employment.
>
> *In this area of the law, an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a pretext for illegal discrimination.* If you find that Mr. Ryder has proven by a preponderance of the evidence that the defendant used the elimination of plaintiff's job as an excuse or pretext *for discriminating against him* on the basis of his age, *then* your verdict will be for the plaintiff.
>
> On the other hand, if you find that the explanation offered by Westinghouse that it eliminated

> Ryder's job to establish a rotational training position and because of his performance were legitimate reasons for plaintiff's termination, and that plaintiff has not proven . . . *that age was a determining factor* in the termination, then your verdict will be for the defendant.
>
> In making this determination, you should be aware of the following: The *burden of proving discrimination always* remains with the plaintiff, to *prove* he was the victim of age discrimination . . . Your job is to determine whether Westinghouse discriminated against Ryder on the basis of his age.

(R. 1234-1236) (emphasis supplied).

The trial judge provided written copies of her proposed charge to counsel for both parties prior to charging the jury. Westinghouse objected to the district court's proposed charge only because it contended the charge permitted the jury to find discrimination based solely on a finding of a *prima facie* case. (R. 1219).[4]

Though it did not object to the district court's use of the phrase "in this area of the law, an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a pretext for illegal discrimination" either prior to or following the district court's charge, *see* (R. 1243-44), or in its Rule 59 motion or brief, *see* (R. 105), Westinghouse, for the first time before the Court of Appeals, took issue with

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[4] Westinghouse's counsel cited *Seman v. Coplay Cement Co.*, 26 F.3d 428, 436-38 (3d Cir. 1994), to argue the district court's charge should not mention the *prima facie* case because once the defendant met its burden of production, the presumption of the *prima facie* case disappeared. *See* (R. 1220-1221).

that language and claims the district court's phrase misstated the law.[5]

Following a two week trial, the jury found Westinghouse had discriminated against Ryder because of his age and awarded $241,909.00.

D. The Third Circuit Ruling.

1. The Memo

The U.S. Court of Appeals for the Third Circuit held that the district court did not abuse its discretion in admitting the Jordan Memo over Westinghouse's objection under Fed.R.Evid. 403. *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 132-33 (3d Cir. 1997). The court recognized a plaintiff may offer circumstantial proof of intentional discrimination on the basis of age in the form of a supervisor's statement relating to formal or informal managerial attitudes held by corporate executives. The court noted that the importance of such comments seem to become ever more critical as sophisticated discriminators render their actions increasingly more subtle to circumvent adverse judicial predecent. *Id.*

The court eschewed a bright line rule of when such ageist statements would be admissible, instead instructing the district courts to evaluate factors pertaining to the declarant's involvement in recognizing a formal or informal managerial attitude, including the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between

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[5] Remarkably Westinghouse attempts to hide its failure to object to the district court's charge by burying that admission in a footnote in the statement of the case. *See* (Petition for Writ of Certiorari at 8, n.6.), and never mentioning it again.

the statement and the challenged employment action. *Id.* at 133.

Although the comments were not directly related to the challenged employment action, they were made by either the company CEO or by executives with authority to render personnel decisions. Moreover, the comments were made in reflection on past managerial viewpoints at Westinghouse with an eye toward future change. If the jury were to believe that these comments accurately reflected a then-existing managerial attitude toward older workers in April 1993, this evidence would have made the existence of an improper motive for Ryder's termination more probable. *Id.* at 133.

2. The Jury Instruction.

The Court of Appeals held that Westinghouse failed to object to the challenged jury instruction as required by Fed.R.Civ.P. 51. It therefore reviewed the jury instruction for plain error. *Id.* at 136. The court noted that while the isolated statement by the district court that in this area of the law an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a pretext for illegal discrimination, was in error, it was offset by the court's repeated correct explanation of Ryder's burden of proof. *Id.* at 137.

Reviewing the jury instructions as a whole, and on a plain error standard, the court found the multiplicity of correct statements of law negated the effect of the district court's solitary erroneous utterance, and therefore the jury instructions were not plainly erroneous. *Id.*

The Third Circuit did not consider the district court's failure to give a curative instruction because Westinghouse never asked for one, not before the jury was charged, not after the jury was charged, and not even in its Motion for a New Trial. *Id.* at 135 & n.9.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

NO ACTUAL CONFLICT EXISTS ON THE ADMISSIBILITY UNDER RULE 403 OF "STRAY REMARKS" EVIDENCE IN AN ADEA PRETEXT CASE.

As this Court has recognized, the question facing triers of fact in discrimination cases – the state of a corporate entity's mind – is both sensitive and difficult. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). There seldom will be "eyewitness" testimony as to the employer's mental process. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993).

In meeting the difficult burden of persuading the fact-finder to disbelieve an employer's account of its own motives, an employee is not limited to presenting evidence of a certain type. Such evidence may take a variety of forms. *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989). For example, evidence that the reasons put forward by the employer are pretextual may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. *Hicks*, 509 U.S. at 511. A plaintiff can prove the defendant's state of mind through circumstantial evidence such as evidence of past conduct or prior incidents. *Aikens*, 460 U.S. at 714 n.3. Other evidence that may be relevant to a showing of discrimination includes the employer's general policy and practice with respect to minority employment. *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792, 804-05 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978).

To show the employer's general policy and practice this Court has recognized, albeit in dicta, that remarks by non-decisionmakers, and by decisionmakers unrelated to the decisional process itself, while not sufficient to trigger a shift of the burden of proof to the employer under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), can certainly be *evidence* that an illegal motive played a part in the employer's decision, *id.*, 490 U.S. at 251 (plurality) or may be probative, *id.*, 490 U.S. at 277 (O'Connor, J. concurring).

The Courts of Appeals do not disagree. In an indirect evidence or pretext case, discriminatory remarks, although unrelated to the employment decision at issue, are probative of pretext and may be used to support a *prima facie* case for a plaintiff using the *McDonnell Douglas/Burdine/Hicks* method of proof. While such remarks do not themselves suffice to either shift the burden of persuasion onto the employer as in a *Price Waterhouse* case, or even to themselves carry the day for the employee in a *McDonnell Douglas* "pretext" case, they do provide some evidence that when coupled with other evidence can support a verdict.

For example, the Seventh Circuit, like the Third Circuit in this case, recognizes that while so-called "stray remarks" are not probative of an employer's intent in a direct proof case, such evidence is probative of discriminatory bias when assessing whether an employer's reasons for an adverse employment action are pretexts for illegal discrimination. *Huff v. UARCO Inc.*, 122 F.3d 374, 385 (7th Cir. 1997).

Likewise, the First Circuit holds that evidence of a corporate state of mind or a discriminatory atmosphere is

not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment. *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987); *Cf. Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 96 (1st Cir. 1996) (stray remarks probative of discrimination although not direct evidence). The Sixth Circuit held in *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1331 (6th Cir. 1994), that statements made by the employer's president more than two decades earlier were probative because the president was the "ultimate decisionmaker" at the employer and evidence that he had a bias goes to the employer's state of mind – a highly probative fact in a discrimination case.

The Second Circuit holds that while discriminatory statements made by nondecisionmakers alone do not prove a discriminatory discharge they may suffice to present a *prima facie* case and may indeed persuade the fact finder that the plaintiff had carried her ultimate burden of persuasion. *Ostrowski v. Atlantic Mutual Ins. Co.*, 968 F.2d 171, 182 (2d Cir. 1992). Likewise, the Third Circuit similarly holds that although temporally remote discriminatory statements standing alone do not suffice, they support a finding of discrimination when combined with other evidence. *Ezold v. Wold, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1993), citing *Roebuck v. Drexel University*, 852 F.2d 715, 733 (3d Cir. 1988); *Antol v. Perry*, 82 F.3d 1291, 1302 (3d Cir. 1996).

The decisions Petitioner cites to support its claim that a conflict exists are readily distinguishable. They involve an analysis of whether the stray remarks at issue are sufficient *in themselves* to either show a *prima facie* case, or to preclude summary judgment. They do not involve

analysis of the probative value of such evidence under Fed.R.Evid. 403 in an ADEA pretext case.

Thus, in *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 549 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 878 (1996), the Fourth Circuit held that the remarks at issue were not *direct evidence*. Because the court had held that the plaintiff in that case did not meet a *prima facie* case, the only way he could proceed was through "direct evidence." *Id.*, 56 F.3d at 548. Likewise, *Wilde v. Florida Pneumatic Mft. Corp.*, 941 F. Supp. 1203 (S.D. Fla. 1996), the district court decision Petitioner claims to represent a trial court in search of a proper analytic standard (Petition at 12) involved a claim that stray remarks support a *prima facie* case and therefore preclude summary judgment when no other evidence of discrimination exists. *Id.* at 1206. *Wilde* searched for decisions in which stray remarks were held to support a *prima facie* case of age discrimination.

In short, no conflict exists among the circuits on the issue in this case, and even if one does exist, that is how it should be. The question of the probative value of stray comments does not lend itself to a black letter rule. The value is determined on a case-by-case basis by reviewing the factors the Third Circuit reviewed in this case.

Because the probative value of stray remarks in a discrimination case is inherently fact and situational bound, no real or intolerable conflict exists among the circuits in this case and Westinghouse's Petition for Writ of Certiorari should be denied.

A. Rule 401 and 403 rulings by trial courts in employment discrimination cases are inherently fact bound and ill suited for broad pronouncements by this Court concerning the probative value of specific evidence.

This Court repeatedly and recently has held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings. *General Elec. Co. et al. v. Joiner*, ___ U.S. ___, 1997 U.S. LEXIS 7503 (December 15, 1997); *Old Chief v. United States*, 519 U.S. ___, ___ n.1, 117 S.Ct. 644, 647 n.1 (1997).

A court of appeals applying "abuse of discretion" review may not categorically distinguish between rulings allowing such testimony and rulings disallowing it, as Petitioner here attempts to do. *See Joiner*, 1997 U.S. LEXIS 7503 at *12.

If judicial self-restraint ever is desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal. *United States v. Long*, 574 F.2d 761, 767 (3d Cir. 1978), *cert. denied*, 439 U.S. 985 (1978). As the Seventh Circuit has aptly held:

> The balancing of probative value and prejudicial effect, like other comparisons of intangibles, requires an exercise of judgment rather than a computation. Only in an extreme case are appellate judges competent to second-guess the judgment of the person on the spot, the trial judge.

Sims v. Mulcahy, 902 F.2d 524, 531 (7th Cir. 1990).

Properly analyzing that standard is exactly why this case is not "cert-worthy." The district judge here was trying an age discrimination case. She was confronted with a record in which the decisionmaker testified he moved Ryder aside to put in a younger up-coming star, and the Jordan Memo evidence was offered to show the

high level management atmosphere in which the company made its employment decisions. The judge admitted the testimony in the middle of the trial after hearing evidence from several witnesses. As the Sixth Circuit has held in a similar factual situation, evidentiary rulings such as this do not have one black letter law, right-or-wrong answer. Rather, they demand swift, but judicious weighing and balancing. *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1332 (6th Cir. 1994).

Indeed, because such questions are subject to a judge's discretion the courts would affirm such evidentiary decisions "either way," whether the response to the lawyer's objection had been sustained or overruled. In short, either ruling could be right, because it is so fact based and involves a view of trial that cannot be obtained from a cold appellate record. Thus, this case is a bad vehicle for this Court to exercise its supervisory role. A reversal based upon appellate disagreement with the trial judge's balancing under Rule 403 necessarily must be founded upon highly subjective reasons, which, experience teaches, are not always readily recognizable or definable. *Long*, 574 F.2d at 767.

Rule 403 itself does not establish a mere imbalance standard between the probative value and the danger of unfair prejudice, but rather provides that evidence "may" be barred, only if its probative value is substantially outweighed by unfair prejudice. Where in that equation is a broad rule that "all stray remarks lack probative value regardless of the factual circumstances?" Leaving the Rule 403 balance to the trial judge, as this Court repeatedly has done, is the best way to resolve the problem of numerous appeals to the circuit courts that Petitioner now purports to champion.

B. Eliminating discrimination, a matter to which Congress has attached some public importance, would not be furthered by blanket legal and logical evidentiary pronouncements.

In this case, Westinghouse's CEO, its President, and its top management team sat in meetings and bemoaned the fact that the company did not have enough younger people; suggested that older workers were blockers who were standing in the way of those younger people; and then noted they had to get the blockers out of the way. The CEO sat by and participated in those conversations, and then circulated a summary of the comments with his endorsement.

Rather than a "vacuous invocation" of the phrase "relevant to corporate attitudes or culture," as Petitioner contends, the evidence in the Jordan Memo goes to the heart of what this Court has recognized is relevant evidence of discrimination – evidence of an employer's policy and practice regarding the protected group at issue. *McDonnell Douglas*, 411 U.S. at 804-05. Such evidence is important in a situation where, as here, plaintiffs are faced with the unenviable task of proving the mind-set of an employer who is unlikely to cooperate. Courts long have recognized that proving intentional discrimination is a difficult task and that plaintiffs must be given wide latitude in marshalling evidence that, by logical inference, supports a finding of discrimination. *Patterson*, 491 U.S. at 187-88.

As Judge Posner has noted: "Defendants of even minimal sophistication will neither admit discriminatory animus, nor leave a paper trail demonstrating it . . . [a]

plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987). *See also Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (anti-discrimination laws and lawsuits have educated would-be violators . . . violators have learned not to leave the proverbial "smoking gun" behind); *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 116-17 (7th Cir. 1986) (stressing that nexus between evidence of discriminatory bias and the decision must typically be inferred, since it is "unusual to find direct evidence of intent").

The lack of direct evidence of discrimination in all but the most rare case is important to determining the probative value of corporate attitudes. As this Court just recently held, the probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point. *Old Chief v. United States*, 117 S.Ct. at 652.

Thus, a price would be paid for the blanket evidentiary pronouncements Petitioner champions, but it would not be paid by companies whose CEO, President and top managers engage in discussions about how to eliminate older workers blocking the way for younger ones. The price for narrowing circumstantial evidence of discrimination in this era when anti-discrimination lawsuits have educated would-be violators to be careful, will be paid by the victims of those sophisticated discriminators.

C. The district court and the Third Circuit correctly admitted the Jordan Memo in this case based on the record.

Here, both the district court and the Third Circuit properly analyzed the probative value of the Jordan Memo. Coupled with Petitioner's generalized and speculative view of the unfair prejudice that admission of the Memo would visit on it, the Court of Appeals found no abuse of discretion in the district court's admission of the memo.

The Jordan Memo was introduced to show the corporate culture in which employment decisions were made – evidence the courts have repeatedly recognized to be admissible as circumstantial evidence of discrimination. *See Antol*, 82 F.3d at 1302; *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995).

Evidence is relevant if it has "any tendency to make the existence or non-existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed.R.Evid. 401. In an age discrimination case, a plaintiff must prove as one element of his case that the defendant intentionally discriminated against him because of his age. To prove the discrimination was intentional, Ryder must show Westinghouse's state of mind. *Burdine*, 450 U.S. at 255; *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices – evidence that in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to

have acted from an unlawful motive. *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 195 (3d Cir. 1994), *citing Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988).

A plaintiff can prove the defendant's state of mind through circumstantial evidence such as evidence of past conduct or prior incidents, *Aikens*, 460 U.S. at 714 n.3, 715; or evidence of subsequent statements or conduct. *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989) (finding age-based comments relevant even when made subsequent to plaintiff's termination).

As the Third Circuit held, not just any ageist statements made by any corporate executive are relevant as evidence of corporate culture, which would circumstantially prove a discriminatory animus. Rather, the court must evaluate factors pertaining to the declarant's involvement in recognizing a formal or informal management attitude, including the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action. *Ryder*, 128 F.3d at 133.[6]

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[6] If this Court finds it desirable to speak on the issue of so-called "stray remarks" evidence in a pretext case, there are much better examples than this case. The statements in the Jordan Memo were not inadverant comments that may have had some age taint to them, such as, for example, the statement in *Waldron v. SL Industries, Inc.*, 56 F.3d 491, 502 (3d Cir. 1995), where a comment was made five months before termination that the employee should lose weight because it would make him look younger.

The court found the Jordan Memo was probative because the comments were made by either the CEO or executives with authority to render personnel decisions and were made in reflection on past managerial viewpoints at Westinghouse with an eye toward future change. *Id.* If the jury were to believe these comments accurately reflected a then-existing managerial attitude toward older workers in April 1993 this evidence would make the existence of an improper motive for Ryder's discharge more probable. *Id.*

Rather than punishing Westinghouse because its managers are "bad," or "politically incorrect" as Petitioner suggests, the discussions in the Jordan Memo go to the heart of Ryder's contentions in this case.

Ryder contended, and the record supports, that he was fired to make way for a younger employee who Westinghouse contended was more "flexible"; in short, that he was a "blocker." That view of younger employees vis-a-vis older ones is precisely the view permeating the Jordan Memo. From managers' statements that the company needed to move aside members of the older workforce to provide opportunities for younger employees, *see* (A-34), to Jordan's observation that the company "seems to be missing the people in the middle of the age range who have talent, the willingness and the horsepower to take on risky change projects," *see* (A-41), the Jordan Memo shows management's view that the older worker will be sacrificed in favor of the younger one, based on stigmatizing stereotypes. *See Hazen Paper*, 507 U.S. at 610-11. Because the Jordan Memo discusses overt age-related preference and uses code-word pejoratives for age as well, a fact finder could certainly believe lower managers would share similar viewpoints. "When a major

company executive speaks, 'everybody listens' in the corporate hierarchy." *Lockhart*, 879 F.2d at 54.

Evidence of that culture is relevant in assessing Westinghouse's intent. The fact that manifestations of that culture showed up in memo form after Ryder was fired does not diminish its relevance. People and companies tend to act consistently. A jury could reasonably find that a high level manager who agreed in 1994 that the company had too many older workers and needed more 30-40 year olds, held that same opinion in 1993. It is reasonable to assume this animus did not develop suddenly, and that it in fact existed at Westinghouse ten months earlier. *See Brown v. Boston University*, 891 F.2d 337, 350 (1st Cir. 1989) (fact that remarks occurred subsequent, rather than prior to discharge does not alter their admissibility. Jury entitled to infer any discriminatory animus toward women manifested in 1982 and 1983 would have existed in 1980 and 1981).

While Congress certainly did not enact laws making political incorrectness or discriminatory comments by managers illegal, circumstantial evidence of a discriminatory atmosphere at a plaintiff's place of employment is relevant to the question of motive in considering a discrimination claim. Such evidence may not be conclusive proof of discrimination against an individual, and, Petitioner's aspersions aside, neither Ryder, the district court, nor the Court of Appeals claim that to be the case. However such evidence tends to add color to the employer's decisionmaking process and to the influences behind the actions taken with respect to the individual plaintiff. *Conway*, 825 F.2d at 597; *West v. Philadelphia Elect. Corp.*, 45 F.3d 744, 757 (3d Cir. 1995).

For all of the above reasons, this case is simply an example of a district court engaging in a Rule 403 balancing, and then the court of appeals using the proper standard to hold that the trial judge did not act arbitrarily and irrationally in her finding that any unfair prejudice did not outweigh the relevancy of the comments. This is especially true because the case centered on a claim involving the state of mind of a fictional entity. Therefore, this case does not present a "cert-worthy" legal issue and Westinghouse's Petition for Certiorari should be denied.

II.

PETITIONER DID NOT EVEN OBJECT TO THE JURY INSTRUCTION IT CLAIMS WAS ERROR.

Petitioner's second proposed reason for granting a writ of certiorari is easily resolved. Westinghouse claims a solitary isolated erroneous remark in the jury instruction required a remand, and that the Courts of Appeals conflict on this issue.

However, even if it is correct (and as set forth below, no conflict actually exists), Petitioner has waived this issue because it failed to object to the language in the jury charge it now attacks. Remarkably, Petitioner attempts to hide this basic problem by alluding to it only in an obscure footnote in its statement of the case, and then ignores the waiver in its argument.

In *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258-259 (1987), this Court held that a failure to object before the district court to a jury instruction precludes review except in rare circumstances. That rule has special force because Fed.R.Civ.P. 51 provides that [n]o party may assign as error the giving . . . [of] an instruction

unless [it] objects thereto before the jury retires to consider its verdict." *Id.* at 259. Rule 51 could not be expressed more clearly, and it serves an important function in ensuring orderly judicial administration and fairness to the parties. The trial judge is informed in precise terms of any objections to proposed instructions and thus is given "an opportunity upon second thought, and before it is too late, to correct any inadvertent or erroneous failure to charge." *Marshall v. Nugent*, 222 F.2d 604, 615 (1st Cir. 1955). Moreover, the rule prevents litigants from making the tactical decision not to object to instructions at trial in order to preserve a ground for appeal.[7]

Here, Petitioner failed to object to the portion of the charge during the charge conference; failed to object when the district judge provided the parties with written copies of her proposed charge; failed to object during argument concerning other language in the written charge, and failed to object immediately after the jury was charged, although the district judge provided the parties with another opportunity to do so. Moreover, Petitioner did not object to the language it now finds so

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[7] In *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985), this Court did review a jury instruction that was not preserved by an objection before the district court. However, in that case, the Respondent first referred to the requirements of Rule 51 in one sentence in her brief on the merits in this Court, at which time she did not even suggest the question had not been preserved. This Court reviewed the question because it was not brought to the Court's attention in the respondent's brief in opposition to the petition for certiorari, and indeed not even raised in the court of appeals. Therefore the Court deemed the waiver issue to have been waived by respondent. *Id.* at 816. Here, of course, Ryder raised the issue in the Third Circuit, *Ryder*, 128 F.3d at 135, and again raises it here.

prejudicial in its post trial motion for a new trial under Fed.R.Civ.P. 50, although it claimed other portions of the charge were erroneous.

The first time Petitioner raised the language it now claims to have misled the jury was with the Court of Appeals. The Third Circuit reviewed the record and found Westinghouse had never objected. *Ryder*, 128 F.3d at 135 & n.9. Petitioner does not here claim the Court of Appeals erred in that finding. The court reviewed the jury instruction as a whole for plain error, and affirmed the verdict finding the multiplicity of correct statements of law negates the effect of a solitary erroneous utterance. *Id.* at 137. The Third Circuit's analysis of why the jury instruction read as a whole was not plain error was correct.[8]

Therefore, even if the jury charge read as a whole was error, which it was not, this Court's commitment of judicial resources to review an ADEA jury instruction would be better left to a case where the objections to those instructions have not been waived. The court repeatedly instructed the jury on the correct burden as set forth in *McDonnell Douglas*, *Burdine*, and *Hicks*. If the Court desires to refine that burden it should wait for a

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[8] Indeed, Petitioner received a more thorough review than a party who fails to object to a jury charge usually receives. *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1306 (3d Cir. 1997) where the court declined to review an asserted error in a jury charge in a hostile environment sexual harassment claim that precluded the jury from considering evidence of quid pro quo sexual harassment or of retaliation because plaintiff failed to specifically object to the charge, and never gave the district court any reason to believe she was making the argument raised on appeal. In short Westinghouse received more from the court of appeals than it even should have.

case where the Petitioner at least gave the district court a chance to address the alleged error.

A. No Conflict Exists Among the Circuits Over Review Of A Waived Jury Charge Issue.

Each of the cases Petitioner cites, therefore, are factually distinct because the party claiming error at least did so before the district court, or the issue of waiver was not involved.

In *Moreau v. Pennsylvania R.R. Co.*, 166 F.2d 543, 544 (3d Cir. 1948) (Petition at 17 n.7), counsel objected to the part of the charge raised on appeal. In *Sessoms v. Union Sav. & Trust Co.*, 338 F.2d 752, 759 (6th Cir. 1964) (Petition at 17 n.7), no waiver was involved. In *Thornley v. Penton Publishing, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997) (Petition at 18), the appellant argued its position on the jury instruction to the district judge, who rejected it. In *Blossom v. CSX Transp., Inc.*, 13 F.3d 1477 (11th Cir. 1994) (Petition at 18), no indication exists in the court's opinion that the plaintiff failed to object. In *Jamesbury Corp. v. Litton Indus. Products, Inc.*, 756 F.2d 1556, 1557 (Fed. Cir. 1985) (Petition at 18), Jamesbury had timely objected to the jury charge on the issue involved. In *Smalley v. Duluth, Winnipeg & Pacific Ry. Co.*, 940 F.2d 296 (8th Cir. 1991) and *Spartaburg County Sch. Dist. v. Nat'l Gypsum Co.*, 805 F.2d 1148 (4th Cir. 1986) (Petition at 18), the courts did not apply a clear error review. In *Houston v. Herring*, 562 F.2d 347, 348 n.1 (5th Cir. 1977) (Petition at 18), appropriate objection was made to the pertinent parts of the instructions. In *Seltzer v. Chesley*, 512 F.2d 1030, 1032, & n.1 (9th Cir. 1975) (Petition at 19), counsel objected to the instruction, and to the proposed curative instruction. Indeed, the court of appeals emphasized what Petitioner seems to forget here:

the purpose of Rule 51 is to give trial judges an opportunity to correct their instructions. *Id.* at 1035.[9]

Not one time during the proceedings before the district court in this case did Petitioner ever mention that it thought the language used was incorrect. It had ample opportunity to do so. The district judge gave both parties wide latitude to raise any problems with the printed charge both before and after it was given. The trial judge

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[9] No conflict exists on the effect of a party's failure to object to a jury charge. *See Graham v. Davis*, 880 F.2d 1414, 1419-20 (D.C. Cir. 1989) (failure to specifically object to jury charge does not preserve error for appellate review); *Elgabri v. Lekas*, 964 F.2d 1255, 1258 (1st Cir. 1992) (failure to object reviewed only for plain error, a doctrine applied sparingly and only in exceptional cases or under peculiar circumstances to prevent clear miscarriage of justice); *Travelers Indemnity Co. v. Scor Reinsurance Co.*, 62 F.3d 74, 79 (2d Cir. 1995) (jury instructions reviewed for fundamental error where failure to object); *Hafner v. Brown*, 983 F.2d 570, 578 (4th Cir. 1992) (failure to object precludes consideration of asserted error on the merits); *Kelly v. Boeing Petroleum Services, Inc.*, 61 F.3d 350, 361 & n.30 (5th Cir. 1995) (plain error review because failure to object); *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 548 (6th Cir. 1995); *Haley v. Gross*, 86 F.3d 630, 644 (7th Cir. 1996) (failure to challenge jury instruction in a civil case constitutes waiver of that challenge and precludes appellate review); *Dupre v. Fru-Con Engineering, Inc.*, 112 F.3d 329, 333 (8th Cir. 1997) (failure to object waives right on appeal to object to a jury instruction on those grounds); *Glover v. Bic Corp.*, 987 F.2d 1410, 1418 (9th Cir. 1993) (absent proper objection to jury instruction, even plain error appellate review is not available); *Campbell v. Barlett*, 975 F.2d 1569, 1576 & n.11 (10th Cir. 1992) (absent objection only appellate review for fundamental error proper); *Wammock v. Celotex Corp.*, 835 F.2d 818, 822 (11th Cir. 1988) (absent objection, no appellate review of jury instruction); *Modine Mfg. Co. v. Allen Group, Inc.*, 917 F.2d 538, 542 (Fed. Cir. 1990) (failure to object to jury instruction precludes challenge on appeal).

made changes suggested by Petitioner on other issues. If the district court never informed the jury it defined "pretext" incorrectly, as Petitioner claims, Petitioner has only itself to blame, because it did not even bring that claim to the district court's attention at trial or in its brief in support of its Motion for a New Trial under Rule 50.

Thus, even if a "markedly different" analysis exists on the issue of dealing with a jury instruction containing a solitary erroneous utterance coupled with a multiplicity of correct statements, this is not the case to resolve that conflict because Petitioner's waiver makes this case different.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

JOHN M. RYDER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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9 pp

TABLE OF CONTENTS

Page

I. Argument 1

II. Conclusion 5

TABLE OF AUTHORITIES

Cases: Page

Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994) 2

Boyle v. Mannesmann Demag Corp., No. 91-3909, 1993 WL 113734 (6th Cir. Apr. 13, 1993) 3

Daubert v. Merrel Dow Pharms., Inc., 509 U.S. 579 (1993) 4

EEOC v. Clay Printing Co., 955 F.2d 936 (4th Cir. 1992) 3

Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) 3

Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309 (6th Cir. 1989) 3

Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984) 3

Henson v. Liggett Group Inc., 61 F.3d 270 (4th Cir. 1995) 3

Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990) 3

Nichols v. Loral Vought Systems Corp., 81 F.3d 38 (5th Cir. 1996) 3

Old Chief v. United States, 117 S. Ct. 644 (1997) 4

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 4, 5

Schrand v. Federal Pacific Elec. Co., 851 F.2d 152 (6th Cir. 1988) 3

Touchet v. Halliburton Co., No. 94-8042, 1996 WL 93974 (10th Cir. Feb. 29, 1996) 2

Wilde v. Florida Pneumatic Mfg. Corp., 941 F. Supp. 1203 (S.D. Fla. 1996) 3

TABLE OF AUTHORITIES—*(Continued)*

Statutes: Page

Fed. R. Evid. 401 ..... *passim*

Fed. R. Evid. 403 ..... *passim*

Fed. R. Evid. 404 4

Fed. R. Evid. 405 4

Miscellaneous:

Gorski, S. & Fliegal, R., *Silence is Golden: Guidelines for Evaluating the Admissibility and Legal Sufficiency of 'Age Related' Statements in Age Discrimination Cases*, 11 Labor Lawyer 189, 190 (1995) 3

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Argument

The petition principally presents the legal question whether, in an individual employment discrimination case, allegedly ageist comments made at a temporally remote point by persons not involved in the challenged decision may nonetheless be admitted under the Federal Rules of Evidence for the purported purpose of establishing "corporate culture" or "a cumulative managerial attitude." (Petition Appendix at A-10). As the petition established, there is substantial confusion and conflict among the lower courts concerning this question. (Petition at 9-13). The petition further demonstrated that

this question is one of substantial importance to the fair and efficient administration of the federal judicial docket. (Petition at 13-14). Finally, the petition showed that admitting evidence for the purpose of establishing "attitude" or "culture" is contrary to federal evidence law's longstanding prohibition on the use of "propensity" or "character" evidence. (Petition at 14-16). Respondent's opposition brief offers no substantial contrary argument.

Real Conflict Exists Among Circuits

After a lengthy, self-serving, and wholly irrelevant rendition of the record evidence in the case (Opposition Brief at 2-13), respondent initially suggests that there is no conflict among the lower courts concerning the standards for admitting so-called "stray remarks" into evidence in individual employment discrimination cases. (Opposition Brief at 13-16). But respondent is clearly wrong.

As respondent suggests, some panels in the First and Third Circuits have held that stray remarks may be used for the purpose of establishing corporate "culture" or "attitude." But, as the petition demonstrated (Petition at 9-13), the vast number of courts have held that such evidence is not admissible to show "propensity" or "character" of the organization but only to show the motive or purpose of the decision in issue, and, accordingly, is admissible only when "a nexus exists between the discriminatory comments to be admitted and the allegedly discriminatory action to be proven." *Touchet v. Halliburton Co.*, No. 94-8042, 1996 WL 93974 at **4 (10th Cir. Feb. 29, 1996) (*citing Cone v. Longmont Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994)).

While respondent correctly notes (Opposition Brief at 15-16) that the question of the evidentiary value of stray remarks evidence frequently arises in the summary judgment context, that observation only demonstrates both the breadth and the depth of the judicial conflict. Contrary to respondent's suggestion, many of the cases are pure admissibility cases and the conflict in judicial approach could not be more striking. *See, e.g., Touchet v. Halliburton Co., supra; Boyle v. Mannesmann*

Demag Corp., No. 91-3909, 1993 WL 113734 at **2 (6th Cir. Apr. 13, 1993); *Fortino v. Quasar Co.*, 950 F.2d 389, 395-96 (7th Cir. 1991); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 155-56 (6th Cir. 1988); *Haskell v. Kaman Corp.*, 743 F.2d 113, 120 (2d Cir. 1984). Moreover, in the summary judgment context, the courts have determined that stray remarks are "probative evidence only when they directly relate to a particular person, employment decision, or pattern of decision making." *Henson v. Liggett Group Inc.*, 61 F.3d 270, 276 (4th Cir. 1995); *accord, e.g., Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41-42 (5th Cir. 1996); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511-12 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 942 (4th Cir. 1992); *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9-10 (1st Cir. 1990); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989). Just as the vast number of courts (but not the Third Circuit) do in pure admissibility cases, these courts are attempting to separate proper uses of stray remarks evidence from improper ones. Thus, the fact that the court in *Wilde v. Florida Pneumatic Mfg. Corp.*, 941 F. Supp. 1203, 1207 (S.D. Fla. 1996) rejected a stray remark as "not probative" in a summary judgment context (Opposition Brief at 16) does not undermine the fact that it recognized three different circuit court evidentiary approaches to the use of such statements by plaintiffs in discrimination cases. *See also* Gorski, S. & Fliegel, R., *Silence is Golden: Guidelines for Evaluating the Admissibility and Legal Sufficiency of 'Age-Related' Statements in Age Discrimination Cases,* 11 Labor Lawyer 189, 190 (1995) (noting with respect to the stray remark doctrine that "courts disagree on the issue of whether age-related statements constitute admissible evidence of age discrimination").

Meaning of Rule - Not Facts - At Issue

Respondent similarly errs in suggesting that "even if [a judicial conflict] does exist, that is how it should be." (Opposition Brief at 16; *see also* 16-18). There is no doubt that trial courts must have discretion in applying rules of evidence law to a myriad of factual situations. Nor is there any doubt that discretionary applications of understood rules of evidence law

are fact-bound and generally not appropriate for this Court's review. However, the question raised here concerns the meaning of the evidence rule itself — whether the Federal Rules of Evidence allow stray remarks evidence to be admitted for the purpose of proving "attitude" or "culture." As the text of Rules 401, 403, 404, and 405 demonstrates, that question is fundamentally one of law, not fact; and, as numerous cases decided by this Court demonstrate, the interpretation of those Rules and the resolution of judicial conflict concerning those Rules is an accepted responsibility of this Court. *See, e.g., Old Chief v. United States,* 117 S. Ct. 644, 647 (1997) (holding that the names and nature of prior criminal offenses are inadmissible to show a prior felony conviction of another offense where the defendant has offered to concede the prior conviction); *Daubert v. Merrel Dow Pharms., Inc.,* 509 U.S. 579, 592-95 (1993) (establishing standards for admissibility of expert opinion under Rules 403, 702, and 703).

Need For Court's Ruling Is Widespread And Immediate

Finally, respondent errs in suggesting (Opposition Brief at 19-25) that intervention by this Court on this question of evidence law would undermine the enforcement of the anti-discrimination laws themselves. While a particular plaintiff or defendant may benefit from an erroneous interpretation of the Federal Rules of Evidence, the employment discrimination laws do not authorize a departure from the evidentiary rules applicable in all other civil cases. Nor do they in any way suggest that continuing judicial confusion about those evidentiary rules is beneficial to the administration of those employment laws. On the contrary, this Court's intervention is needed so that the huge volume of cases arising under these laws, in which the stray remarks issue is a frequently recurring question, are administered under uniform and fair standards.

The stray remarks doctrine has never been the subject of a majority opinion of this Court. *See Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) (opinion of Brennan, Marshall, Blackmun and Stevens, JJ.); *id.* at 256 (White, J. concurring); *id.* at 261 (O'Connor, J. concurring); *id.* at 279 (Kennedy, J.,

dissenting, joined by Rehnquist, C.J. and Scalia, J.). Moreover, since *Price Waterhouse* was decided, the amended Civil Rights Act of 1991 has produced a radical escalation in the number of jury trials. The resulting exponentially increased potential for unfair prejudiee and jury confusion heightens the importance of clearly specifying the evidentiary standards to be applied to stray remarks by the trial courts in employment cases.

II. Conclusion

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, Petitioner respectfully asserts that its Petition for Writ of Certiorari should be granted.

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